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SUPREME COURT, U.S.

SUPREME-COURT OF THE UNITED STATES

No. A-513- 75-817

NEBRASKA PRESS ASSOCIATION, et al.,

Petitioners,

vs.

HUGH STUART, Judge District Court  
of Lincoln County, Nebraska,

Respondent.

MOTION TO TREAT PREVIOUSLY-FILED  
PAPERS AS A PETITION FOR A WRIT  
OF CERTIORARI, AND FOR AN EXPE-  
DITED HEARING

TO THE HONORABLE CHIEF JUSTICE and THE HONORABLE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Nebraska Press Association; Omaha  
World-Herald Company; the Journal-Star Printing Co.; Western  
Publishing Co.; North Platte Broadcasting Co.; Nebraska Broad-  
casters Association; Associated Press; United Press International;  
Nebraska Professional Chapter of the Society of Professional  
Journalists/Sigma Delta Chi; Kiley Armstrong; Edward C. Nicholls;  
James Huttenmaier; William Eddy, respectfully pray that this  
Court treat the "Application for Stay of an Order of the District  
Court in and for Lincoln County, Nebraska" filed in this Court  
on November 5, 1975, supplemented by an opinion and judgment  
of the Supreme Court of Nebraska in this case (under title of  
Nebraska ex rel. Nebraska Press Ass'n v. Stuart, No. 40471, and  
Nebraska v. Simants, No. 40445), issued on December 1, 1975  
(a copy of which was attached to a letter to the Deputy Clerk  
of this Court from counsel for Petitioners dated December 1,



1975), as a Petition for a Writ of Certiorari filed by Petitioners herein. In the alternative, Petitioners respectfully pray that the Court treat the instant motion, which incorporates by reference the opinion and judgment of the Nebraska Supreme Court referred to above, as their Petition for a Writ of Certiorari herein. (For the use of a similar procedure, see New York Times Co. v. United States, 403 U.S. 713 (1971).)

Jurisdiction is founded on 28 U.S.C. § 1257(3).

Petitioners recognize that this case presents several procedural peculiarities. Mr. Justice Blackmun, in his November 13, 1975, In Chambers opinion, deferred to the jurisdiction of the Nebraska Supreme Court. When that court refused to act promptly, Mr. Justice Blackmun treated that refusal as a final judgment and entered his own order on November 20, 1975. The Nebraska Supreme Court thereafter entered its opinion and judgment of December 1, 1975. There would appear to be some question, therefore, as to whether certiorari correctly should be sought from the prior restraint order of the Lincoln County District Court and the refusal of the Nebraska Supreme Court to act in a timely fashion upon an appeal from that order, or whether certiorari should instead be sought from the Nebraska Supreme Court opinion and judgment of December 1, 1975. However, since in either event Petitioners are seeking the same relief and on the same grounds, the problem is easily resolved by requesting certiorari in the alternative -- either from the District Court order and Nebraska Supreme Court refusal to act, or from the opinion and judgment of December 1. Since the opinion and judgment of December 1 are before the Court by virtue of being incorporated herein by reference, there would appear to be no difficulty in this Court taking whichever view

of the procedure to date that it feels is most appropriate.

Both the facts and the law have been sufficiently treated in the papers heretofore filed and will not be repeated here, in the interest of time. It is particularly vital that immediate action be taken by this Court in the light of the facts that the prior restraint order has been in effect for almost six weeks -- during which period the public has been deprived of important news about a judicial proceeding of vital local interest -- and that trial in the proceeding has now been set for January 5, 1976. Petitioners will add here only a few of the anomalies which have arisen in this most extraordinary proceeding and which might not be readily apparent to the Court:

(a) Petitioners may now print in full the opinion of the Nebraska Supreme Court (see page 16 of that opinion) but are not allowed to print the opinions in the same case of Mr. Justice Blackmun (see Mr. Justice Blackmun's November 20th opinion, page 10, paragraph 5).

(b) Petitioners, because they chose to contest the District Court's order, are subjected to prior restraints which under the Nebraska Supreme Court opinion are no longer applicable to any other media in the State of Nebraska or elsewhere (see December 1 opinion at pages 5 and 16). In other words, Petitioners' competitors can print and publish the very items of information which Petitioners may not. The Nebraska Supreme Court observed that if Petitioners had not contested the prior restraint order by submitting themselves to the jurisdiction of the District Court, they "could have ignored the [prior restraint] order." (Page 11.) This interpretation imposes a penalty on taking all appropriate steps to protect the

constitutional rights of the public as well as the media.

(c) Among the facts which the Nebraska Supreme Court forbids Petitioners from publishing (see page 16) is any "information strongly implicative of the accused as the perpetrator of the slayings." Such a restraint, which could apply to any fact from the suspect's arrest to his hiring of a criminal attorney, is totally incapable of logical interpretation and application.

(c) The "proof" of injury to the accused relied upon by the Nebraska Supreme Court (page 12) consisted of articles in three newspapers, one of which is published 200 miles from the present planned site of the trial and another of which is published 250 miles from the site and in another state.

(e) The restraints imposed by the Nebraska Supreme Court represent the views of a minority of that court. Chief Justice White and Justice Clinton dissented on jurisdictional grounds and never reached the merits. Justices Spencer and Newton joined the majority solely to resolve the dispute but said they agreed with the dissenters. Thus, the actual views which underlie the prior restraints imposed here apparently are only those of Justices Boslaugh, McCowan and Brodkey.

The record in this case is now on file in this Court. We respectfully submit that that record will not support a finding of "clear and present danger," not only of the type heretofore treated as controlling by this Court, but of any type at all.

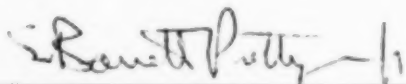
If certiorari is granted, Petitioners are prepared to adhere to whatever briefing and hearing schedule is established by the Court. We respectfully suggest that typewritten briefs

could be filed within hours or days, and that argument could be held forthwith thereafter. Petitioners move for an expedited schedule in recognition of the fact that "the very day-by-day duration of [a] delay would constitute and aggravate a deprivation of \*\*\* constitutional rights, if any, that the petitioners possess and may properly assert." Mr. Justice Blackmun's In Chambers opinion of November 13, 1975, at page 6. In this regard, we again call the Court's attention to the doctrine asserted in United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972), 476 F.2d 373 (5th Cir.), cert. denied, 414 U.S. 979 (1973), to the effect that the media must, on pain of criminal contempt, obey even a blatantly unconstitutional court order until that order is reversed on appeal. Whether that doctrine is right or wrong, it was premised upon the media's right of immediate appeal, hearing and decision. Almost six weeks of prior restraint obviously constitute a denial of that right.

Wherefore, Petitioners respectfully move that their Application heretofore filed in this Court on November 5, 1975, be treated as their Petition for a Writ of Certiorari herein, or, in the alternative, that the instant Motion be treated as such a Petition. Petitioners further move that if certiorari is granted, briefs be filed and a hearing scheduled on an expedited basis.

Respectfully submitted,

HOGAN & HARTSON

By   
E. Barrett Prettyman, Jr.

815 Connecticut Avenue, N. W.  
Washington, D. C. 20006  
(202) 331-4685

McGILL, KOLEY & PARSONAGE, P.C.

By James L. Koley (EBP/h)  
James L. Koley

By Stephen T. McGill (EBP/h)  
Stephen T. McGill

Suite 217, 10050 Regency Circle  
Omaha, Nebraska 68114  
(402) 397-9988

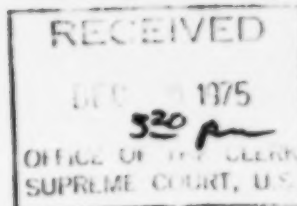
Attorneys for Petitioners



IN THE  
SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-817



NEBRASKA PRESS ASSOCIATION, OMAHA  
WORLD-HERALD CO., THE JOURNAL-STAR  
PRINTING CO., WESTERN PUBLISHING CO.,  
NORTH PLATTE BROADCASTING CO.,  
NEBRASKA BROADCASTING ASSOCIATION,  
ASSOCIATED PRESS, UNITED PRESS  
INTERNATIONAL, NEBRASKA PROFESSIONAL  
CHAPTER OF THE SOCIETY OF PROFESSIONAL  
JOURNALISTS/SIGMA DELTA CHI, KILEY  
ARMSTRONG, JAMES HUTTENMAIER, AND  
WILLIAM EDDY,

Petitioners,

v.

THE HONORABLE HUGH STUART, Judge,  
District Court of Lincoln County,  
Nebraska,

Respondent.

RESPONSE OF STATE OF NEBRASKA TO  
APPLICATION FOR STAY OF  
JUDGMENT OF NEBRASKA SUPREME COURT  
IN STATE V. SIMANTS, NO. 40471

RESPONSE OF STATE OF NEBRASKA TO  
MOTION TO TREAT PREVIOUSLY FILED PAPERS  
AS A PETITION FOR WRIT OF CERTIORARI,  
AND FOR AN EXPEDITED HEARING

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

RESPONSE TO APPLICATION FOR STAY OF JUDGMENT  
OF NEBRASKA SUPREME COURT

While the Application for Stays herein applied for by the petitioners encompass the Orders of both the District Court and Supreme Court of Nebraska and, in addition, requests vacation by the Court of that part of Mr. Justice Blackmun's Order entered under date of November 20, 1975 which leaves in effect any aspect of the District Court's Order prohibiting publication of information in State of Nebraska vs. Erwin Charles Simants, No. B-2904, entered October 27, 1975, your respondent has been directed by the Deputy Clerk of this Court to respond only to the Application for Stay of the Nebraska Supreme Court Judgment.

In conjunction therewith, petitioners invoke the jurisdiction of this Court pursuant to Section 28 U.S.C. Section 2101 (f). It is respectfully submitted that said statutory authority may not be relied upon to invoke the jurisdiction of the entire Court. Said Statute provides for the stay of a final judgment of any Court subject to review by the Supreme Court on Writ of Certiorari, for a reasonable time, to enable the party aggrieved to obtain a Writ of Certiorari from the Supreme Court. By its precise terms, the Statute provides that the Stay may be granted by a Judge of the Court rendering the Judgment or Decree or by a Justice of the Supreme Court. In addition, the Statute contemplates a supersedeas bond in an amount sufficient to answer for all damages and costs which the other party may sustain by reason of the Stay.

Obviously, the Statute relied upon contemplates action by a Judge of the Court rendering the Judgment or

Decree or by a single Justice of this Court. It is therefore submitted that the purpose of this procedure is to provide a summary procedure to enable an aggrieved party to take proper and necessary steps in making Application for a Writ of Certiorari for consideration by this Court. It is respectfully submitted that petitioners' Application for Stay of the Judgment of the Nebraska Supreme Court entered herein pending final disposition by this Court of the Petition for Writ of Certiorari filed by petitioners should not be entertained for lack of jurisdiction and for the further reason that the expeditious handling of this matter, now before the Court, precludes the practical necessity for such a Stay.

In the event that this Court is not in agreement with your respondent and determines that it does in fact have jurisdiction to enter a Stay of the Order of the Nebraska Supreme Court in Case No. 40471, it is respectfully submitted that a Stay should not be entered on the merits. This is so because of the importance of the issue before the Court. At issue is the resolution of an apparent conflict between the guarantees of the First and Sixth Amendments to the Constitution. The Court is called upon to draw an accommodation between these two preferred Amendments which will preserve the right to a fair trial without abridging freedom of speech and freedom of the press. The Supreme Court of the United States has not yet had occasion to speak definitively where the clash between these two preferred rights was sought to be accommodated by a prior restraint on freedom of the press. However, this Court has indicated that under some circumstances prior restraint may be appropriate. The case of Branzburg v. Hayes, 408 U.S. 665 (1972), involved the claimed right of a newsman not to be compelled to testify before a Grand

Jury. This right was denied and Mr. Justice White in the majority opinion stated as follows:

"The prevailing view is that the press is not free with impunity to publish everything and anything it desires to publish . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from Grand Jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and meetings of private organizations. Newsmen have no constitutional right of access to scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to insure the defendant a fair trial before an impartial tribunal." P. 361.

In Shepherd v. Maxwell, 384 U.S. 333 (1966),

this Court stated in part as follows:

"From the cases coming here we note that unfair prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that prescribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the Judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the Judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered but we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the Court should



be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censorable and worthy of disciplinary measures. . . . Since the State Trial Judge did not fulfill his duty to protect Shepherd from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the Habeas Petition."

Shepherd v. Maxwell clearly imposes a duty upon the trial Judge, prosecutors, counsel for the defense, the accused, witnesses, court staff and enforcement officers to preclude frustration of the judicial process. The implication in Shepherd v. Maxwell that prior restraints may, under some conditions, be imposed, is given additional credence when read in conjunction with Pennecamp v. United States, 328 U.S. 331, wherein Mr. Justice Reed stated:

"Free discussion of the problems of society is a cardinal principle of Americanism, a principle which all are zealous to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct. It does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in light of the affect on himself and on the public of creating a clear and present danger to the fair and orderly judicial administration. Courts must have the power to protect the interests of prisoners and litigants before them from unseemly efforts to prevent judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against the possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."

this Court held that a prior restraint on the media bears a heavy presumption against its constitutional validity. The clear implication of such statement is that if there is only a presumption of unconstitutionality, then there must be some circumstances under which prior restraints may be constitutional.

The Nebraska Supreme Court at Page 9 of its Per Curiam opinion, the substance of which is the subject of this Application for Stay makes the following statement:

"It is of course, absolutely clear that the purpose of freedom of the press is not to determine the outcome of litigation by newspaper publicity, although unfortunately on some occasions it has been so used. Shepherd v. Maxwell, (supra.); State v. Lovell, 117 Neb. 710; Irvin v. Dowd, 366 U.S. 717; Rideau v. Louisiana, 373 U.S. 723."

The position of the petitioners herein is that the First Amendment rights of freedom of speech and freedom of press are inviolate; that under no circumstances may there be any valid prior restraint upon these admittedly vitally important freedoms. It is respectfully submitted that this position is untenable. No single right or freedom protected by the Constitution of the United States can be read to the exclusion of all other rights and freedoms. The Constitution is a living document. Its parts are not completely autonomous. The protected rights of freedom of the press and freedom of speech must necessarily be read in conjunction with the Sixth Amendment right to a fair trial. Mr. Justice Blackmun in his opinion under date of November 20, 1975 recognized this basic fact and upheld the order of the District Court of Nebraska restricting coverage of: (1.) Confessions or admissions against interests made by the accused to law enforcement officials. (2.) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any

statements, if any, made by the accused to representatives of the news media; (3.) Other information strongly implicative of the accused as perpetrator of the slayings. The judgment of the Nebraska Supreme Court conforms with Mr. Justice Blackmun's opinion.

It is respectfully submitted that the basis for entering a Stay of the Judgment of the Nebraska Supreme Court pending final disposition by this Court of the Petition for a Writ of Certiorari filed by petitioners may properly be entered only in a circumstance where the judgment is clearly void. On the basis of the authorities cited above, it is respectfully submitted that the Order of the Nebraska Supreme Court imposing limited restrictions on news coverage of the case here involved, the facts of which as presented to the Court by petitioners is accepted by your respondent, is not clearly void, and in fact is clearly within the guidelines established hereinabove.

Presuming that the Judgment of the Supreme Court of Nebraska here in question is not void as a matter of law, we move now to the merits of the Stay as applicable to the proceedings to which it applies. In this conjunction, it is respectfully submitted that petitioners herein are not entitled to a Stay of the Judgment of the Nebraska Supreme Court in Case No. 40471 for the reason that they have not met their burden in establishing the existence of the required standards enunciated in Graves v. Barnes, 405 U.S. 1201 (1972), and reiterated by Mr. Justice Powell in Times-Picayune Publishing Corporation v. Schulingkamp, 419 U.S. 1301 1974, relative to the issuance of such a Stay.

1. Likelihood of Irreparable Harm:

Petitioners contend that they will suffer irreparable harm if the Order of the District Court of Lincoln County is not immediately stayed. Your respondent submits that the effect of such stay would be to destroy any restrictions on pre-trial

coverage of evidentiary matters, including the existence and contents of certain alleged statements, confessions, and statements against interest reported in the Preliminary Hearing held before the County Court of Lincoln County, Nebraska, on October 22, 1975. It should be pointed out that the Motion for Restrictive Order filed by the State of Nebraska on October 21, 1975, sets forth, that by virtue of the extensive coverage of this action, by both national and local news media, there is a reasonable likelihood of prejudicial news, which would make difficult, if not impossible, the empaneling of an impartial jury and tend to prevent a fair trial should the defendant be bound over to trial. The rationale behind the Prosecution's request is very accurately set forth by petitioners in the first paragraph of Page 12 of their Application, filed with the United States Supreme Court on or about November 4, 1975, which reads as follows:

"Petitioners recognize that, in some cases, it is arguable that irreparable damage might occur should the defendant's conceded right to a fair trial, for these purposes grounded in his indisputable right to a trial by an impartial jury of his peers selected from a fair cross-section of the community in which the publicity, pre-trial or contemporaneous to trial, that would prevent the empaneling of a constitutionally acceptable jury. Petitioners would initially point out that the irreparable injury in such a situation is not that defendant will be incarcerated on the basis of an unfair trial; the injury is to society as a whole, which, due to the impossibility of a defendants obtaining a fair trial, must necessarily forego a conviction of a person who may well have committed the crime for which he is charged." (Emphasis Added)

The paragraph immediately set forth above is an accurate statement of the position of the State of Nebraska. Not only does there arise the question of the defendant's right to a fair trial pursuant to the Sixth Amendment of the United States Constitution, but a corollary of that right is the right of the people to effective prosecution resulting in the conviction of one charged with a crime, provided the State meets its burden of "proof beyond a reasonable doubt". Adverse publicity, which would make



improbable the empaneling of a jury composed of twelve impartial individuals, selected from a cross-section of the community in which the offense occurred, has a severely detrimental effect upon the right of the people of the State of Nebraska to effective and expeditious handling of the matter before the Court. A limited restrictive order designed to preclude this injury is a step which should be taken by a responsible trial judge. Petitioners position is exemplified by a comment made by one of their attorneys on their Application for removal of the restrictive order, held before the District Court of Lincoln County, Nebraska, at about 8:00 p.m. on October 31, 1975, wherein it was stated in substance that it is better that a guilty man should go free than that freedom of the press should be restricted. Your respondent disagrees with that philosophical statement and would respectfully submit that when the effective prosecution of individuals charged with crimes is likely to be impeded by unrestricted publicity, a limited restrictive order is proper.

Relative to the "clear and present danger" standard which petitioners admit to be applicable to the issuance of a restrictive order, Petitioners allege in the action before this Court that the probability of irreparable injury resulting from any pretrial publicity is both remote and speculative. Respondent would respectfully submit that the District Court of Lincoln County, found otherwise. A comment by another of petitioners' attorneys at the hearing before the District Court on October 31, 1975, relative to Petitioners Application for removal of the restrictive order, was to the effect that, in his opinion, by virtue of the publicity that had already been printed, it would be impossible for a trial to be had in Lincoln County in any event. Therefore, by petitioners' own admission, a "clear and present danger" exists threatening the Court's ability to secure a panel of twelve impartial jurors in Lincoln County. This certainly adds force to the Court's decision.

Petitioners further suggest that the threat of injury is remote by virtue of the trial being months away. This is a conclusion of petitioners not substantiated by any Court proceedings and, it does not acknowledge the prosecution's statutory obligation to bring the matter to trial within six months, 29-1207 R.R.S. Supp. 1974. Further, Nebraska law requires that the trial of a criminal case shall be given preference over civil cases, and that the trial of a defendant who is in custody and whose pretrial liberty is reasonably believed to present unusual risk must be given preference over other criminal cases. 29-1205 R.S. Supp. 1974. Defendant here involved is being held without bail and the trial must, therefore, be held at the earliest possible date. In compliance with these statutory obligations, the trial judge has set a January 5, 1976 trial date. Because of the early trial date, and in view of the great interest expressed in this case both regionally and nationally, petitioners' position that adverse effects of pretrial publicity would be substantially reduced by virtue of a cooling off period between arrest and trial is untenable.

Petitioners suggest that a motion for change of venue could be made and sustained as a tool to be used by the Court minimizing the effects of adverse pretrial publicity. Your respondent submits that the granting of a motion for change of venue would not be effective. Petitioners herein include the Omaha World-Herald Co. which publishes a newspaper of general circulation for the entire State of Nebraska; United Press International, and Associated Press, both national organizations for the dissemination of news, not only through Nebraska but throughout the entire country; and the Nebraska Broadcasters Association, the State organization of broadcasters.

Thus, it can be seen that the publicity that this case has received, and is likely to receive in the future, is not localized in Lincoln County, but pervades the entire State of Nebraska and the nation itself.

Given the desire of these powerful organizations to report the tragic event which took place in Lincoln County and is the subject of this action, and given the public exposure inherently possessed by these instrumentalities of dissemination, it would appear that the limited restrictive order entered by the District Court of Lincoln County to preclude wide-spread pretrial publicity of an inflammatory and prejudicial nature is necessary.

It is submitted that a change of venue to surrounding counties may also be precluded in terms of obtaining a fair and impartial jury in the absence of such restrictive order. It should be pointed out that this case involves the mass murder of six people in a small Nebraska community and that the entire population of Nebraska is approximately one and one half million. There have been only a handful of cases involving the murder of six or more people in recent United States history. Given the magnitude of the crime and the inflammatory nature of certain portions of the testimony adduced at the Preliminary Hearing, it would appear that a limited restriction of coverage is certainly warranted.

Relative to petitioners' allegations that the passage of time before the trial will destroy much of the prejudicial effect of pretrial publicity, it is respectfully submitted that scarcely a single day has gone by since the occurrence wherein there has not been a report of the progress of this action in the North Platte Telegraph. This newspaper is the newspaper of general circulation throughout Lincoln County. The matter, certainly being newsworthy, and being put before the people each day, is not likely to lessen in importance as time goes by, but rather will become of greater importance to the people of this community.

Petitioners also suggest that a continuance of the trial would also be a satisfactory method of minimizing the adverse effects of pretrial publicity. Your respondent submits

/s/

that this solution is unworkable. As discussed above, the Statutes of the State of Nebraska require the trial Court to give precedence to a case of this nature over all others. The trial Court, the District Court of Lincoln County, Nebraska, invoked the only remedy available to it to insure the defendant his right to a fair trial, as well as the right of the State of Nebraska to effective prosecution and justice.

The threat to a fair trial in this case is neither speculative nor remote. The trial Court found that there was indeed the possibility that certain publicity, in a limited area, would make it difficult if not impossible to empanel an impartial jury. The petitioners' reliance on Murphy v. Florida, 95 S.Ct. 2031 (1975), amounts to an admission that prospective jurors may be influenced.

It is true that news information and exposure do not presumptively deprive a defendant of due process. However, in certain circumstances, and your respondent submits that this case falls within those circumstances, such a presumption would rise to a much higher status and, in fact, could be the basis of a finding that the defendant did not receive a fair trial, thereby depriving the people of the State of Nebraska their right to effective prosecution of a heinous crime.

The entering of a restrictive order by the Honorable Hugh Stuart, District Judge in and for Lincoln County, Nebraska, was predicated on the motion of the prosecution, joined in by defense counsel. The request was made in an effort to protect, not only defendant and his rights but, also, the people of the State of Nebraska and their right to effective prosecution.

Petitioners argue that the Constitution of the State of Nebraska and Section 24-311 R.S. Supp. 1974 require all Court proceedings to be open to the general public. It should be noted that all proceedings in this case have been open to the public, but that dissemination of certain information, hereunder more specifically discussed, has been restricted in

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a limited fashion. Such a restrictive order would appear to be both proper and sanctioned in a situation where its absence presents a "clear and present danger" of an inability to empanel a fair and impartial jury. Shepherd v. Maxwell.

Your respondent fully agrees with petitioners that a prior restraint upon the press, to any degree, should only be imposed in the most limited circumstances. However, it is submitted that those circumstances clearly exist in the case of State of Nebraska v. Erwin Charles Simants.

It must be remembered that at the time the trial judge acted, a restrictive order entered by the County Court of Lincoln County was already in existence. It could be anticipated that should the trial judge have refused to enter a restrictive order, this refusal may have been interpreted by the news media as a Court determination that anything relative to facts within their knowledge concerning the case would be proper for dissemination. The reality of this danger is substantiated by a front page article written by William Eddy, one of the petitioners herein, appearing in the North Platte Telegraph on October 24, 1975, wherein Mr. Eddy, in discussing the bar-press guidelines here involved states as follows:

"There is some question among newsmen as to whether the guidelines cover testimony at a Preliminary Hearing. If they do, newsmen who attended Wednesday's Preliminary Hearing generally agree that parts of the testimony by at least three witnesses should not be reported."

Therefore, it would appear, that should the newsmen have decided that the guidelines do not cover testimony at a Preliminary Hearing all testimony of the witnesses could have been reported. It is respectfully submitted that petitioners herein are confusing the issue of a public trial and pretrial publicity.

As set forth in the Per Curium opinion of the Nebraska Supreme Court at Page 12:

"The record demonstrates clearly that even before the defendant was afforded a Preliminary Hearing which the Statutes of this state, namely Section 29-1607 R.S. Supp., (1974), and probably the Constitution of the United States, requires (see Gerstein v. Pugh, 420 U.S. 103), certain of the newspapers had printed articles which contained hearing information, of purported statements of counsel, which, if true, tended clearly to connect the accused with the slayings and which information, if true, was likely to be, or at least some of it, presented at the Preliminary Hearing. The items to which we refer were printed in the articles of the October 20, 1975, issue of the North Platte Telegraph; the October 20, 1975, issue of the Lincoln Star; the October 20, 1975, issue of the Denver Post. This information, if obtained from official sources, would not under the provisions of Item 1 of the Guidelines under the heading "Information Generally not Appropriate for Disclosure and Reporting" be appropriate for reporting. The record shows that this was recognized by some of the media, but doubt was expressed that the voluntary guidelines would apply at a preliminary hearing. The District Court, therefore, could quite properly conclude that their evidence from the Preliminary Hearing, if it was in fact presented, would have again been repeated by at least some of the relators."

## 2. Possibility of Reversal of Lower Court's Decision:

Your respondent does not accept petitioners' avowal that an analysis of case law leads to the conclusion that petitioners would prevail on the merits before this Court. Under the standard of "clear and present danger" the Nebraska Supreme Court took such steps as it deemed necessary to insure an orderly disposition of this case. The nature of the crime charged and the underlying circumstances of the crime made it imperative that the trial court take necessary steps to eliminate the "clear and present danger" by the issuance of a restrictive order which, in light of the circumstances, is narrow in scope. Not only is the action of the trial Court constitutionally permissible but is demanded in order to insure the protection of the fundamental rights presented to this Court. It remains within the province of the trial Court to determine reasonably what steps must be taken in order to insure the



orderly disposition of cases before it. The trial Court alone had access to the information and evidence needed to make this decision. Indeed, it was the failure of the trial Court to act responsibly in this regard which caused it to commit prejudicial error in the case of Shepherd v. Maxwell.

Petitioners complain that the order in question restricts only members of the news media and not other officers of the Court or members of the general public. The Nebraska Bar-Press Guidelines for Disclosure and Reporting on Information Relating to Imminent or pending Criminal Litigation in its opening statement reads: "Generally, it is not appropriate to disclose or report the following information." Therefore, it is obvious that certainly officers of the Court and Court personnel are precluded from disclosing information pursuant to the order as surely as the news media is precluded from reporting such limited information. It would be ludicrous for the Court to impose an order on members of the general public who were present in Court for the Preliminary Hearing to the effect that they could not discuss the matter with their friends and relatives in that such an order obviously would be impossible to enforce. The purpose of the restrictive order is to preclude such a saturation of the community with prejudicial pretrial publicity as to render it improbable that a fair and impartial jury may be obtained.

Petitioners rely heavily on Times-Picayune and Cox Broadcasting.<sup>1</sup> Your respondent submits that these cases are clearly distinguishable from the instant case and are not dispositive of the questions here presented. In Times-Picayune, the defendant was arrested some days after the commission of the crime, but the restrictive order was not entered until eleven months later. That fact alone distinguishes the cases. Your respondent does not argue that the concept of

<sup>1</sup> Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)

a "cooling off period" was not applicable to that case involving a crime which was committed in New Orleans which city has a population of several million persons. Obviously, there is a vast difference in the number of potential jurors available and their exposure to violent crimes between New Orleans and the State of Nebraska. The entire State of Nebraska only has a population of approximately one and one-half million persons. The conclusion to be drawn therefrom is inescapable. Further, the order of the trial Court in Times-Picayune was more pervasive than that of the trial Court in the instant case.

Cox Broadcasting is distinguishable by the fact that the matters published had been adduced at a trial. In the instant case we are dealing with matters that were adduced at a Preliminary Hearing. It is submitted that the very nature of a Preliminary Hearing is to establish probable cause for the arrest of the defendant. Hearsay testimony may be admissible and the fact that certain evidence is adduced at a Preliminary Hearing does not in any sense insure that such information will be received into evidence at the time of trial. Absent an order restricting pretrial publicity of matters which may be prejudicial to the right of the State of Nebraska to effective enforcement of its laws and the right of a criminal defendant to a fair trial, both the prosecution and defense, in a situation such as is now before the Court, are faced with a serious dilemma.

The right to a Preliminary Hearing is a right belonging to the accused. He may waive the Preliminary Hearing should he desire. However, if it is impossible to restrict prejudicial coverage, a criminal defendant, if he chooses to exercise his right to a Preliminary Hearing, may prejudice his right to a fair trial. In addition, by virtue of the evidence which the State may be required to submit at the Preliminary Hearing in order to obtain a bind over to the District Court, the right of the citizens of the State of Nebraska to effective prosecution

as a result of prejudicial publicity emanating from testimony adduced at the Preliminary Hearing may also be frustrated. If the defendant, on the other hand, chooses to waive a Preliminary Hearing he may be precluded from raising the legal question of "probable cause" for his arrest. In the instant case, the exercise of defendant's right to a Preliminary Hearing, in the absence of a restrictive order, is detrimental to the case of the State of Nebraska. In the absence of a restrictive order, the prosecution would have been required to choose between the possibility of not adducing enough evidence to secure a bind over of the defendant to the District Court for trial or of submitting enough evidence to insure the bind over but possibly pave the way for a mistrial due to prejudicial pretrial publicity. It is respectfully submitted that neither the right of the defendant to a Preliminary Hearing nor the right of the State of Nebraska to effective enforcement of its laws should be impaired by prejudicial coverage by the media.

The fact that the restrictive order restrained the press from publishing the entire proceedings of the Preliminary Hearing while the general public was not so restricted only recognized a practical consideration. The Court cannot hope to enforce an order requiring individual citizens to refrain from discussing what they saw and heard at the Preliminary Hearing. However, because of the potential damage from, and wide-spread pervasive dissemination by the press, a practical approach was followed by the District Court of Lincoln County and upheld by the Nebraska Supreme Court, entering a restrictive order on pretrial publicity, limited in scope.

Your respondent recognizes the important responsibility and right of the news media to publish public information. It is not submitted that the First Amendment right is subservient to that of the Sixth Amendment. Rather, the question here involved is a matter of timing. The facts and circumstances surrounding this case demanded immediate and responsible action by the trial Court.

Petitioners admit that the Courts recognize the validity of narrow restrictive orders upon pretrial publicity. Newspapers Inc. v. Black, No. A-985, Cert. Denied, June 2, 1975. The order here involved is a narrow protective order designed to ensure both the defendant his right to a fair trial by an impartial jury and the State's right to prosecute an individual for a crime without the possibility of a mistrial being declared due to prejudicial pretrial publicity.

3. The Probability That Four Members of the Court Would Grant Certiorari:

Relative to this standard, your respondent respectfully defers to the judgment of the Court. However, it is submitted that the narrow limitations imposed by the restrictive order presented to the Court do not provide a vehicle which can properly provide effective guidelines to the questions here involved. The factual circumstances before the Court on the Application of petitioners do not present an issue sufficiently meritorious to warrant a Writ of Certiorari. While there is no question that there is need for guidance in the area of potential conflict between the First Amendment right of freedom of the press and freedom of speech and the Sixth Amendment right to a fair trial, it would appear that this is not an appropriate case to provide such guidance.

The administration of criminal justice in the United States demands that the press generally be allowed to publish freely all matters transpiring in open Court. The news media is an important watchdog for the people to ensure the proper functioning of the judicial system. However, the administration of criminal justice also demands, that in certain circumstances, pretrial publicity must be limited in order to ensure the rights established under the Constitution of the United States.

There will be no objection to the publishing of trial testimony as it is received into evidence at the time of



trial for the reason that a jury will have been empaneled and, in all likelihood, sequestered at that time. Therefore, the publicity reported at the time of trial will in no way prejudice the proper functioning of the judicial system.

It is submitted that the limited restrictions imposed upon the press, relative to pretrial publicity, in a case of this magnitude, are totally justifiable within the concept of "clear and present danger".

For the above reasons your respondent prays that the Application herein for an immediate Stay by this Court of the Judgement of the Nebraska Supreme Court in Case No. 40471 pending final disposition by this Court of the Petition for a Writ of Certiorari by petitioners be dismissed.

RESPONSE TO MOTION OF PETITIONERS TO  
TREAT PREVIOUSLY FILED PAPERS AS A PETITION FOR  
A WRIT OF CERTIORARI, AND FOR EXPEDITED HEARING.

The petitioners have asked this Court to treat previously filed papers as a Writ of Certiorari, or, in the alternative, treat the Motion itself as a Petition for the Writ of Certiorari. The petitioners cite New York Times Co. as precedent for such procedure. However, the Times case involved appeals from the Federal District Court and Circuit Court of Appeals and, therefore, bears no similarity to the instant case.

The Rules of the United States Supreme Court provide procedures to follow in petitioning the Court for a Writ of Certiorari. The rules are not merely procedural niceties but provide an organized guide to insure the proper administration of justice.

The Rules also provide a safeguard for procedural due process. Due process cannot be guaranteed through summary procedures whereby petitioners file a Motion in which they admit they do not know the basis on which they rely for the granting of a Writ of Certiorari. Further, the Rules provide a basis upon which respondent may properly reply to the

rationale propounded by petitioners argument that a Writ of Certiorari should be granted. Petitioners failed to accomplish this end in their Motion to treat previously filed papers as a Petition for a Writ of Certiorari.

As to its argument for treating the previously filed papers as a Petition for Writ of Certiorari or the Motion itself, petitioners point to alleged anomalies in these proceedings:

1. Petitioners complain that they may print the entire opinion of the Nebraska Supreme Court, but that only portions of the opinion of Mr. Justice Blackmun may be printed. Respondent submits that this observation cannot be a basis for a Writ of Certiorari.

2. Petitioners point out that they alone are subjected to the prior restraints under the Nebraska Supreme Court opinion. Petitioners voluntarily subjected themselves to the jurisdiction of the District Court of Lincoln County, Nebraska. There was no penalty imposed solely because of their voluntary submission to the jurisdiction of the Court. Rather, the action of the Nebraska Courts resulted in a natural judicial determination, based on their interpretation of the law, and was binding on all parties over which it had jurisdiction, including Petitioners who had voluntarily submitted to such jurisdiction.

3. Petitioners state that a portion of the Order of the Nebraska Supreme Court is "totally incapable of logical interpretation and application". Interpretation and application do not go to the merits of the issue before this Court and are merely a conclusion of the Petitioners, unsupported by argument.

4. Petitioners state that the proof of injury relied upon by the Nebraska Supreme Court consisted of articles in three newspapers, two of which were located some

distance from the probable site of trial. This argument is unfounded. There were indeed other circumstances considered by the trial Court which were taken into account by the Nebraska Supreme Court. (Pages 12 and 13.)

5. Petitioners argue that the order of the Nebraska Supreme Court is a minority view of that Court. Respondent would point out that the opinion was a Per Curiam opinion, in which five members of the Court joined. Petitioners further states that "Justice Spencer and Newton joined the majority solely to resolve the dispute but said they agreed with the dissenters". A reading of the concurring opinion does not lead to that conclusion. While Judges Spencer and Newton agreed with the dissenting opinion, they did, in fact, join in the majority opinion. Therefore, the views which underlie the prior restraints imposed are those of Judges Boslaugh, McCown, Brodkey, Spencer, and Newton.

Respondent respectfully submits that the Motion of the Petitioners and the arguments contained therein are insufficient to constitute a Petition for Writ of Certiorari. Therefore, respondent respectfully requests that the Motion of the Petitioners be denied and that the applicable rules of the United States Supreme Court be followed by the Petitioners.

#### MOTION FOR EXPEDITED HEARING

If this Court treats the Motion of the Petitioners as a Petition for Writ of Certiorari, the respondent would not oppose the Motion for Expedited Hearing and would comply with any decision of this Court. However, Respondent respectfully requests this Court to take into consideration the practical limitations of time and manpower in the County Attorney's Office of Lincoln County, Nebraska, and requests that it be allowed a reasonable time to prepare for any further proceedings in this matter.

WHEREFORE, for the above reasons, the respondent prays that the Applications for Stays and the Motion to Treat Previously Filed Papers as a Petition for a Writ of Certiorari be denied, and in the alternative if the Motions are granted, that the Respondent be allowed a reasonable time to prepare for any further proceedings.

RESPECTFULLY SUBMITTED

RESPONDENT, THE STATE OF NEBRASKA

By Milton R. Larson  
MILTON R. LARSON  
Lincoln County Attorney

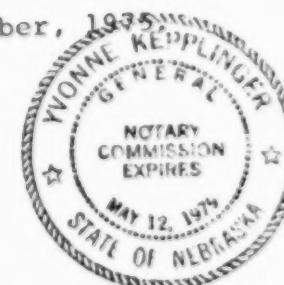
By John P. Murphy  
JOHN P. MURPHY  
Deputy Lincoln County Attorney  
For: Office of Lincoln County Attorney  
Lincoln County Courthouse  
North Platte, Nebraska 69101  
308-534-4350, exts. 270, 271, 272

STATE OF NEBRASKA )  
                          ) SS  
COUNTY OF LINCOLN )

MILTON R. LARSON, being first duly sworn, on oath, deposes and says that he is the duly elected, qualified and acting County Attorney in and for Lincoln County, Nebraska and that he is one of the respondents herein; that he has read the foregoing, knows the contents thereof, and that the statements therein contained are true as he verily believes.

Milton R. Larson  
MILTON R. LARSON

SUBSCRIBED and sworn to before me this 8th day of December, 1975



Yvonne Kepplinger  
Notary Public

RECEIVED

DEC 4 1975

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

No. 75-817 \*

NEBRASKA PRESS ASSOCIATION, et al.,

Petitioners,

v.

HUGH STUART, JUDGE, DISTRICT COURT  
of LINCOLN COUNTY, NEBRASKA,

Respondent.

RESPONSE IN OPPOSITION TO APPLICATION  
TO STAY THE ORDER OF THE NEBRASKA SUP-  
REME COURT AND MOTION TO TREAT PREVIOUSLY  
FILED PAPERS AS A PETITION FOR A WRIT OF  
CERTIORARI, AND FOR AN EXPEDITED HEARING

PAUL L. DOUGLAS  
Attorney General  
State of Nebraska

Harold Mosher  
Assistant Attorney General  
State of Nebraska

Melvin Kent Kammerlohr  
Assistant Attorney General  
State of Nebraska



I.

THE ORDER OF THE NEBRASKA SUPREME COURT  
SHOULD NOT BE STAYED

The order of the Supreme Court of Nebraska should not be stayed because it is a reasonable order under the circumstances, and follows the earlier opinion of the Honorable Mr. Justice Blackmun.

The mere fact that the Supreme Court of Nebraska held that the present petitioners' are subject to the order because they subjected themselves to the jurisdiction of the Lincoln County District Court and does not bind those who did not so subject themselves is nothing unusual. Parities are frequently held under the jurisdiction of the court when they file any kind of an appearance other than a special appearance. The attorneys for petitioners could have filed an original action in the Supreme Court of Nebraska for a writ of mandamus of the County Court order if they were anxious to determine if they were bound by that order; instead they appealed to the District Court of Lincoln County, Nebraska. As this Court knows, they later did file an original action of mandamus in the Supreme Court of Nebraska. This was then their tactical error in subjecting themselves to the jurisdiction of the District Court of Lincoln County, Nebraska.

As we have pointed out in our previous response to the Honorable Mr. Justice Blackmun:

"The Supreme Court of Nebraska clearly stated in Delay v. Brainard, 182 Neb. 509, 156 N.W. 2d 14 (1968), and in a number of cases before and since as follows:

'A preliminary hearing did not exist at common law. In this jurisdiction it is provided for by statute. Its functional purpose is stated in section 29-506, R.R.S. 1943. A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of our Constitution. See Roberts v. State, 145 Neb. 658, 17 N.W. 2d 666.

' "We have repeatedly held that a preliminary hearing is in no sense a trial of the person charged in regard to his guilt or innocence. Its purpose is to ascertain whether or not a crime has been committed, and whether or not there is probable cause to believe the accused committed it. Fugate v. Ronin, 167 Neb. 70, 91 N.W. 2d 240. The effect of the foregoing, if found to exist, is to hold the accused for trial in district court, which has jurisdiction to try him. See Dobrusky v. State, 140 Neb. 360, 299 N.W. 539." (182 Neb. at 511, 512).

"This issue was of particular importance in the case of Ronzzo v. Sigler, 235 F. Supp. 839 (D. Neb. 1964), where petitioner sought habeas corpus relief from a state court conviction because he had not had counsel or right to cross examine (among other things) at preliminary hearing. The federal district court however, pointed out:

'A preliminary hearing in Nebraska has the functional purpose of determining whether the offense charged has been committed and whether there is probable cause to believe the defendant committed it. Lingo v. Hann, 161 Neb. 67, 71 N.W. 2d 716 (1955); Neb. Rev. Stat. Sec. 29-506 (Reissue 1956). " 'It is in no sense a trial of the person accused.' Roberts v. State, 145 Neb. 658, 17 N.W. 2d 666 (1945).  
. . . '

' . . . .

'Counsel has urged that the lack of counsel denied Ronzzo his traditional and zealously guarded right of cross-examining the State's witness. Again it must be emphasized that a preliminary hearing is for the defendant's protection and that its purpose is not to determine the guilt or innocence of petitioner . . . .' (235 F. Supp. at 840, 841.)

'Thus the only purpose of a preliminary hearing in the State of Nebraska is to determine whether or not the defendant should be held or released on bond pending the filing of an information in the proper Court, or released entirely. In the case of a felony it would be filed in the state district court. The preliminary hearing may be waived entirely by the defendant. It is solely for for his protection. Neb. Rev. Stat. § 29-1607 (Supp. 1974) declares:

'No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, unless such person shall waive his right to such examination; except as otherwise provided in the Uniform Criminal Extradition Act.'

"Thus under the Nebraska procedure at the time of the entering of the orders complained of in the present case the information, which is the charging document in place of an indictment of a grand jury had not nor could not have been filed in the state district court.

"There can be no question had the state proceeded by way of a grand jury in the investigation of this case that the public and press could have and would have been completely barred from the proceedings until such time as an indictment issued."

There seems to be little question but that defendant Simants could have waived his preliminary hearing altogether; also he could have asked for the preliminary hearing to be closed to the public. If the ABA Standard 3.1, Fair Trial and Free Press, adopted by the Supreme Court of Nebraska in the present case (see page 16), is constitutional the press would have had no right to be present at all. This puts them in exactly the same position as this Court stated in the recent case of Pell v. Procunier, 417 U.S. 817, 94 Sup. Ct. 2800, 41 L.Ed. 2d 495 (1974) quoting from Branzburg v. Hayes:

" ' . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathering in executive session, and the meetings of private organizations. Newsmen have no constitutional right to access to the scenes of crime or disaster when the general public is excluded.' Branzburg v. Hayes, supra, at 684-685, 33 L Ed 2d 626 . . . " (41 L. Ed. 2d at 508)

We reiterate that under the circumstances Mr. Justice Blackmun and the Supreme Court of Nebraska were reasonable and in fact, undoubtedly, gave the press more that it was entitled to under

the particular circumstances. As this Court knows, once the information is filed against the defendant Simants in the District Court of Lincoln County, Nebraska, and the trial begins, there is no reporting limitation whatsoever.

As we explained in our previous response to the Honorable Mr. Justice Blackmun, venue in criminal cases in Nebraska must be in the county where the offense was committed or, if a change of venue is allowed, the case may be transferred to an adjoining county. Also, as previously pointed out, the population of Lincoln County, Nebraska, is only 29,538, the next largest adjoining county is 19,537, and then in the following order, 14,092; 8,487; 3,982; 3,423; 991; and 623. With a population this sparse and a crime of this magnitude, the news spreads like wild fire without the help of the press. The difficulty in securing an impartial jury will be most difficult at best.

## II.

THE APPLICATION AND PREVIOUS PAPER SHOULD BE TREATED AS A PETITION FOR CERTIORARI AND THE PETITION FOR CERTIORARI SHOULD BE DENIED.

This Court's own rule 19 provides that a writ of certiorari should only be granted as a matter of sound judicial discretion and then only where special and important reasons exist such as where a state court has decided a federal question of substance, or has decided it in a way probably not in accord with applicable decisions of this Court. Obviously, from what has been said previously, none of these reasons exist here. In fact, the opinion of the Supreme Court of Nebraska is directly in line with Pell v. Procunier, supra, and Branzburg v. Hayes, 408 U.S. 665 (1972).

The First Amendment to the Constitution of the United States does state that, "Congress shall make no law \* \* \* abridging the freedom of speech, or of the press \* \* \*." This does not restrict the courts in protecting the rights of an accused under the Sixth

Amendment. The Sixth Amendment does state that the accused shall have a speedy public trial by an impartial jury, but, we suggest, these are the rights of the accused - not the press nor the public. This case has not even reached this state. The accused could have waived the preliminary hearing and the press would not even have had the information which the order inhibits. The preliminary hearing could have lawfully been closed with a like result. In this situation it was opened with restrictions. The press was present being aware of those restrictions. Thus, they were possessed of information which was not theirs to legally receive in the first place. How this could give rise to a constitutional right in the public and press in view of the First and Sixth Amendment is a little difficult to perceive. The petitioners simply are not possessed of any title, right, or privilege to that information under the Constitution of the United States and therefore under 28 U.S.C. § 1257(3) certiorari should not be granted.

### III.

THIS CASE SHOULD NOT BE EXPEDITED IF THE COURT DETERMINES TO GRANT CERTIORARI.

Should the Court decide to grant certiorari, it must mean that the Court has determined that the Supreme Court of Nebraska has decided an important federal question possibly contrary to the way this Court would decide it. If this be the case, then a decision of such import which would be controlling over pre-trial publicity, should have the necessary time for minds to think and research and arrive at a proper, rather than a hurried decision.

As pointed out previously, there are no reporting limitations as soon as the Simant's case goes to trial which has already been set for January 5, 1976. If this case is important enough to grant certiorari it must be important enough for proper consideration

the same as any of the other important cases in which this Court grants certiorari. However, it would seem crystal clear that the rights of the press have not been invaded in the present case and that the Court should act expeditiously in denying certiorari in disposing of the matter.

RESPECTFULLY SUBMITTED

HUGH STUART, Judge of the District Court of Lincoln County, Nebraska, Respondent.

By PAUL L. DOUGLAS  
Attorney General of the  
State of Nebraska

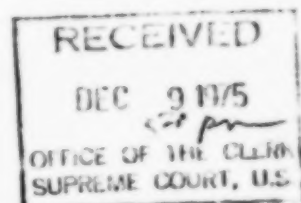
By Harold Mosher  
Assistant Attorney General

and

By Melvin Kent Kammerlohr  
Assistant Attorney General

Attorneys for Respondent.





IN THE SUPREME COURT OF  
THE UNITED STATES

NO. 75-817

THE STATE OF NEBRASKA, ex rel )  
NEBRASKA PRESS ASSOCIATION; )  
OMAHA WORLD-HERALD COMPANY; )  
THE JOURNAL-STAR PRINTING CO.; )  
NEBRASKA BROADCASTERS ASSOC- )  
IATION; WESTERN PUBLISHING CO.; )  
NORTH PLATTE BROADCASTING CO.; )  
ASSOCIATED PRESS; UNITED PRESS )  
INTERNATIONAL; NEBRASKA PRO- )  
FESSIONAL CHAPTER OF THE SOCIETY )  
OF PROFESSIONAL JOURNALISTS/ )  
SIGMA DELTA CHI; KILEY ARMSTRONG; )  
EDWARD C. NICHOLLS; JAMES )  
HUTTENMAIER; WILLIAM EDDY; )

Relators, )

vs. )

THE HONORABLE HUGH STUART, )  
Judge, District Court of Lincoln )  
County, Nebraska, )

Respondent. )

RESPONSE AND BRIEF  
OF  
ERWIN CHARLES SIMANTS

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Court has asked the respondent three questions raised by  
the application of the Nebraska Press Association, et al, in the above entitled  
matter. Those questions are:

1. Whether a stay of the order of the Nebraska Supreme Court  
should be granted by the Supreme Court of the United States  
and whether Justice Blackmun's order should be stayed.
2. Whether the documents filed with the Supreme Court by  
the petitioners in the above entitled matter should be con-  
sidered as a petition for a writ of certiorari.

3. Whether the matters on briefing and hearing of this matter before the Supreme Court of the United States should be expedited.

We address ourselves to each question separately.

I.

With regard to the question of whether a stay of the Nebraska Supreme Court should be ordered, it is agreed that there have been procedural irregularities and exceptions to this point to normal procedures both before the Nebraska Supreme Court and before this Court. We submit that a stay of the orders heretofore granted by any of the Courts should not be granted because, as set forth in respondent's brief in the Nebraska Supreme Court, the matter involved here is essentially criminal in nature and affects the defendant's rights pursuant to the Fifth and Sixth Amendments of the Constitution of the United States and Article I, Section 11 of the Constitution of the State of Nebraska. The initial approach to the problem with regard to pre-trial publicity by the respondent in consenting to the prosecution's motion for restricted press coverage and moving further for closed pre-trial hearings was to protect his right to secure an impartial jury. Under Nebraska law, Section 29-1301, R.R.S. 1943, as amended, provision is made that the defendant shall be tried in the county of his residence or if a motion for a change of venue supported by proper affidavits is successful then the matter shall be moved to "some adjoining county" - Section 29-1301, R.R.S., supra. The defendant's rights to due process of law, both under the laws of the State of Nebraska and under the Constitution of the United States are directly in question here. A principal part of due process being the ability to select a fair and impartial jury in the county where the offense had been allegedly committed. While this matter coming before this Court is apparently unique in the fashion it was brought before the Court, it would appear that the respondent in this matter should be entitled to the procedural due process provisions of Section 28-1257, USCA, and

Section 28-2101, USCA, and the supporting Rules of the Supreme Court of the United States, specifically Rules 18(2), 27, and 51 (1) and (2). Sincy any order entered by this Court prior to the time of respondent's trial commencing January 5, 1976 would materially affect that trial and would be an integral part of the pre-trial proceedings leading up to the actual trial itself.

Petitioners maintain their application before this Court unless granted will irreparably injure the petitioners and prevent them from gathering, printing, and receiving important pre-trial information. We submit that since the orders in question here, the order of Judge Hugh Stuart of the Thirteenth Judicial District of Nebraska and the Nebraska Supreme Court and the order of Justice Blackmun affect the pre-trial publicity that could affect the trial here, the orders of these Courts are a part of due process to which the respondent is entitled. In that he must place reliance upon the rules, regulations, and statutes as they affect his trial in the pre-trial stages. Section 28-2101 (f), USCA, provides:

"\* \* \*for a stay of an order pending the obtaining of a writ of certiorari from the Supreme Court and such order may be stayed by a Justice of the Supreme Court." (Emphasis supplied.)

Further, Rule 51 of the Supreme Court Rules provides:

"1. Stays may be granted by a Justice of this Court as permitted by law; and writs of injunction may be granted by any Justice in cases where they might be granted by the Court\* \* \*".

And such Rule further provides:

"2. All applications for stays or injunctions made pursuant to this or any other rule must show whether application for the relief sought has been made to the appropriate Court or Courts below or to a Judge or Judges thereof and shall be submitted as provided in Rule 50 \* \* \*."

The above Rule refers back to Rule 18(2) and 27. It is, first of all, submitted here that this matter has already been entertained by Justice Blackmun of this Court and an order issued by him remanding certain matters to the Nebraska Supreme Court. The Nebraska Supreme Court has issued an order and opinion regarding this matter and has further remanded some of the portions of this matter back to



the District Judge of the Thirteenth Judicial District in Lincoln County, Nebraska. It is submitted here that the petitioners herein have had this matter considered by one Justice of the United States Supreme Court as provided by Section 28-2101 and the accompanying Rules. The record herein does not show that the petitioners herein have filed an application for a stay of the order of the Supreme Court of the State of Nebraska; therefore, no compliance has been made with the Rules of the Supreme Court of the United States or of the applicable Statutes and that, therefore, a stay should not be granted. Since the situation here involves questions of great constitutional magnitude - that is the balancing of the interests between the First and Sixth Amendments of the Constitution of the United States. We submit to the Court that allowing a stay of any of the orders entered thus far are such as could greatly jeopardize the respondent's ability to obtain a fair and impartial trial in Lincoln County, Nebraska or in any of the adjoining counties. As is shown by the matters on file before the Court, Lincoln County, Nebraska is a County with a population of approximately 30,000 individuals and the surrounding counties are even less populated making the selection of a jury that much more difficult. Since it appears from the above statutory provisions and Rules of the Supreme Court as cited that a stay in this matter can be issued only by one Justice and that the petitioners herein have not complied with the rules of obtaining such a stay in this instance and since it appears from the statutory provisions and from the rules that it is the duty of one Judge to enter the stay rather than the entire Supreme Court and, further, since the respondent herein is relying upon the orders as heretofore entered both by the single Justice of the Supreme Court of the United States and the Supreme Court of the State of Nebraska in making pre-trial preparations a stay of the order at this point in time would greatly jeopardize his rights to due process and the obtaining of a fair and impartial trial in Lincoln County, Nebraska. We, therefore, ask that the Court not enter a stay of either the order of Chief

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Justice Blackmun, the Nebraska Supreme Court, or Judge Hugh Stuart of the Thirteenth Judicial District of Lincoln County, Nebraska.

2.

The second question to which we address ourselves is as to whether or not the documents herein are filed with the Supreme Court of the United States should be considered as a petition for a writ of certiorari, we submit to the Court that the documents heretofore on file with the Court are not such as can be considered for a petition for a writ of certiorari. Rules 22 and 23 of the Supreme Court Rules specifically apply with regard to petitioning the Court for a writ of certiorari and the petitioners have not complied with the Rules of the Court and the applicable statutory provisions. Further, Rule 24 provides for the filing of briefs by the respondent. His attorneys are at the present time in the process of preparing for trial, which trial is schedule to commence in the Lincoln County District Court on January 5, 1976 and Rule 24 of the Court provides that counsel for the respondent shall have 30 days for making response to the petition filed for a writ of certiorari and must necessarily rely upon the applicable statutory provisions and the Rules of the Court in making response to the question here. While the question involved is one which only leads up to the trial of the defendant here in the Lincoln County District Court, it is submitted that prior to the time of the trial herein scheduled for January 5, 1976, it is necessary for the respondent to file various pre-trial motions such as a motion for change of venue, motion to suppress any evidence, motion in limine, and other motions and in the preparation of these motions he is essentially in a position of relying upon the orders of the various Courts as heretofore entered. Since the various matters now on file with the Court do not conform with the Rules applying to petitioning the Court for a writ of certiorari that the respondents herein be required to come with such Rules and to follow the normal statutory provisions and the Rules of the Court in making their application for a writ of certiorari. In the event that the

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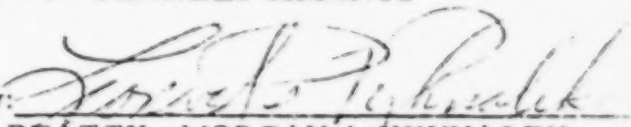
Court does feel that the documents here on file should be treated as a petition for a writ of certiorari, then it is submitted that the respondent herein should be allowed to provide briefs in opposition within the 30 day period as required by Rule 24 of this Court.

3.

In answer to the question as to whether the briefing and hearing should be scheduled on an expedited basis, it is submitted that the various rules providing for the filing of briefs in the Supreme Court of the United States make no provision for expediting the time of filing such briefs and in fact such rules, specifically Rule 24, provides that the normal 30 day requirement for the filing of reply and supplemental briefs may be enlarged. While the Rules provide for the enlargement of time in which to file briefs there is no provisions for accelerating such briefing times or the hearing time. In line with our argument here, to expedite this matter would in fact constitute a denial of due process as far as the respondent is concerned; we ask that the Court follow the usual time requirements applying to a petition for a writ of certiorari.

Respectfully submitted,

ERWIN CHARLES SIMANTS

By:   
of BEATTY, MORGAN & VYHNALEK  
Box 548, 212 No. Dewey  
North Platte, Nebraska 69101  
(308) 532-5090

KEITH N. BYSTROM  
Box 808, 100 E. 5th Street  
North Platte, Nebraska 69101  
(308) 534-2120

HIS ATTORNEYS

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Supreme Court, U. S.  
FILED

DEC 24 1975

IN THE

**Supreme Court of the United States** JR., CLERK

OCTOBER TERM 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTERS ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY;

*Petitioners,*

v.

THE HONORABLE HUGH STUART, JUDGE, District Court of  
Lincoln County, Nebraska,

*Respondent.*

**AMENDED PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE  
STATE OF NEBRASKA**

JAMES L. KOLEY  
STEPHEN T. MCGILL  
MCGILL, KOLEY & PARSONAGE, P.C.  
Suite 300  
10010 Regency Circle  
Omaha, Nebraska 68114

*Attorneys for Petitioners*



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1975

No. 75-817

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NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTERS ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY;

*Petitioners,*

v.

THE HONORABLE HUGH STUART, JUDGE, District Court of  
Lincoln County, Nebraska,

*Respondent.*

---

**AMENDED PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE  
STATE OF NEBRASKA**

This Court, by Order in No. A-513, granted on December 8, 1975 petitioners' motion praying that the previously filed papers in No. A-426 and A-513 be treated as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska. On December 12, 1975, the Petition for a Writ of Certiorari was granted and this Court in its Order of December 12 invited petitioners to file an Amended Petition for a Writ of Certiorari. This Amended Petition is filed pursuant thereto.



### Opinions Below

The opinions of the County Court of Lincoln County, Nebraska, dated October 22, 1975, and the District Court of Lincoln County, Nebraska, dated October 27, 1975, are set forth in the Appendix at p. 1a and 9a. The *per curiam* statement of the Nebraska Supreme Court issued on November 10, 1975 is set forth in the Appendix at p. 19a. The opinion of Mr. Justice Blackmun, dated November 13, 1975 is set forth in the Appendix at p. 21a. The Order of the Nebraska Supreme Court for Hearing and Order to Show Cause entered on November 18, 1975 is set forth in the Appendix at p. 29a. The opinion of Mr. Justice Blackmun dated November 20, 1975 is set forth in the Appendix at p. 35a. The majority and dissenting opinions of the Nebraska Supreme Court dated December 1, 1975 are set forth in the Appendix at p. 44a and are reported at 63 Neb. S.C.J. 783, — N.W.2d —. The Orders of this Court, dated December 8, 1975 and December 12, 1975, *inter alia*, granting the motion of petitioners to treat papers previously filed by them with this Court as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska and granting said Petition are set forth in the Appendix at p. 70a and p. 71a. Except as indicated above, none of said opinions is thus far reported.

### Jurisdiction

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

### Questions Presented

1. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, an injunction may issue prohibiting publication by the press of in-

formation revealed in public court proceedings, in public court records, and from other sources about pending judicial proceedings.

2. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, a direct prior restraint may be imposed upon the publication by the press of information which does not relate to national security and which could not surely result in direct, immediate and irreparable injury to the nation or its people.

3. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, the injunction of the Nebraska Supreme Court dated December 1, 1975 prohibiting publication by the petitioners can be sustained as a matter of fact and law on this record.

### Constitutional Provisions Involved

The First Amendment to the United States Constitution provides:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The Sixth Amendment to the United States Constitution provides:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed

of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### Statement of the Case

Petitioners in this case are Nebraska newspaper publishers, broadcasters, journalists and media associations, and national newswire services that report from and to Nebraska. Petitioners are engaged primarily in the business of gathering, reporting, publishing and broadcasting local, national and international news, as well as other matters of interest, to their readers, listeners and to the general public. Petitioners have been ordered in a series of decisions of the County Court in and for Lincoln County, Nebraska, the District Court in and for Lincoln County, Nebraska, the Respondent, Judge Hugh Stuart presiding, and the Supreme Court of the State of Nebraska to refrain from publishing a broad spectrum of information, much of which was and is a matter of public record, relating to a case now awaiting trial in Nebraska entitled *State v. Simants*. The factual background leading up to these orders is, in brief, as follows:

On or about October 18, 1975, six members of the Kellie family were allegedly murdered in their home at Sutherland, Nebraska, and one or more of the alleged murders were purportedly in connection with the perpetration of or attempt to perpetrate one or more sexual assaults.

On October 19, 1975, defendant Erwin Charles Simants was arrested by the Lincoln County Sheriff and later charged with six counts of murder in the first degree in the perpetration or attempted perpetration of one or more sexual assaults, all of which is set forth in the complaint and amended complaint filed in the County Court of Lincoln County, Nebraska. At the arraignment hearing held before the County Court, several journalists were in attendance. Although a portion of the hearing was conducted openly, a part of the hearing was closed by the court to the press and the public.

The preliminary hearing was scheduled in the County Court of Lincoln County, Nebraska, at 9:00 A.M. on October 22 for a determination as to whether Simants should be bound over to the District Court of Lincoln County, Nebraska, on the charges set forth in the amended complaint. On October 21, the prosecution filed a motion with the County Court requesting that a restrictive order be entered by that court. This motion alleged "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial should the defendant be bound over to trial in the District Court if testimony of witnesses at the preliminary hearing is reported to the public." The defense joined in the prosecution's request and also moved that the preliminary hearing be closed to the public and the press. The latter request was denied by the County Court and an open preliminary hearing was held on October 22, at which time testimony was taken from various witnesses which disclosed significant factual information concerning the alleged crimes.

However, on that day, the County Court entered an Order which found that there was "a reasonable likelihood of prejudicial publicity which would make difficult, if not impossible, the impaneling of an impartial jury in the event the defendant is bound over to the District Court for trial. . . ." (App. p. 1a).<sup>\*</sup> Without holding an evidentiary hearing, the County Court imposed broad restrictions on all attorneys, parties, witnesses, court personnel and all other persons "present in court" during the preliminary hearing prohibiting them from "releas[ing] or authoriz[ing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing." (App. p. 2a). The County Court also ordered that "no news media disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation." <sup>\*\*</sup> (App. p. 2a).

On October 23, petitioners forthwith filed an application with the District Court of Lincoln County, Nebraska, for leave to intervene in the case and for vacation of the County Court's order. Counsel for the defendant moved for con-

<sup>\*</sup> References to "App. p.—" are to the appropriate pages of the Appendix to this Amended Petition.

<sup>\*\*</sup> Excepted from the scope of the County Court's order were: (1) factual statements of the accused's name, age, residence, occupation, and family status; (2) the circumstances of the arrest (time and place, identity of the arresting and investigation officers and agencies, and the length of the investigation); (3) the nature, substance and text of the charge; (4) quotations from, or any reference without comment to, public records or communications heretofore disseminated to the public; (5) the scheduling and result of any stage of the judicial proceeding held in open court; (6) a request for assistance in obtaining evidence; and (7) a request for assistance in obtaining the names of possible witnesses. The Court also ordered that a copy of the preliminary hearing proceedings was to be made available to the public at the expiration of the order. (App. pp. 2a-3a).

tinuation of the County Court's Order and that all future pretrial proceedings in the *Simants* case be closed. On the same day, the District Court granted petitioners' motion to intervene, denied defense counsel's motion to close any future pretrial District Court proceedings, and adopted as its own on an interim basis the County Court's restrictive order. On October 27, the District Court terminated the County Court's order and substituted its own. The District Court found "because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." (App. p. 9a). The District Court adopted the aforementioned Nebraska Bar-Press Guidelines as "clarified" by the court in its order. The District Court ordered as follows:

1. It is hereby stated the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing, is "pre-trial" publicity.
2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it.
3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported.
4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at careful discretion of the press. The testimony



of this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.

5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported.

6. The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported." \* (App. pp. 10a-11a).

On October 31, petitioners sought relief from the District Court's order after having duly abided by the various orders of both the County and District Courts for nine days. Petitioners sought a stay from the District Court of its order and on the same day sought from the Supreme Court of Nebraska immediate relief, by way of mandamus, stay, and/or expedited appeal, from the District Court's order. Upon the failure of both the District Court and the Supreme Court of Nebraska to act on the requested relief, the petitioners filed an application on November 5 with this Court (directed to Mr. Justice Blackmun, as Circuit Justice) which sought a stay of the District Court's order. Apparently in response to the November 5 application by the petitioners and in order to avoid exercising

\* That part of the District Court's order relating to the physical presence of the press at trial has not been contested by petitioners and is not now contested.

parallel jurisdiction with this Court, the Supreme Court of Nebraska issued a *per curiam* statement on November 10 in which that court declined to take any action on the petitioners' writ of mandamus action pending before it until such time as this Court made known whether it would accept jurisdiction in the matter. (App. p. 19a).

On November 13, Mr. Justice Blackmun, acting in his capacity as Circuit Justice, issued a chambers opinion in which he declined to act finally on the petitioner's application for stay of the District Court's order "[o]n the expectation, which I think is now clear and appropriate for me to have, that the Supreme Court of Nebraska, forthwith and without delay, will entertain the petitioners' application made to it, and will promptly decide it in the full consciousness that time is of the essence." (App. p. 28a). In so ruling, on November 13, Mr. Justice Blackmun noted that "if no action on the petitioners' application to the Supreme Court of Nebraska could be anticipated before December 1 . . . a definitive decision by the state's highest court on an issue of profound constitutional implication, demanding immediate resolution, would be delayed for a period so long that the very day-by-day duration of that delay would constitute and aggravate a deprivation of such constitutional rights, if any, that the petitioners possess and may properly assert. Under these circumstances, I would not hesitate promptly to act." (App. p. 27a). Mr. Justice Blackmun reserved the right to petitioners "to re-apply to me should prompt action not be forthcoming." (App. p. 28a).

On November 18, the Nebraska Supreme Court set November 25 as the date on which it would hear petitioners' arguments on their request for mandamus and on the substantive questions surrounding the validity under the Constitution of the District Court's order. (App. p. 29a). The petitioners, pursuant to the November 13 ruling of Mr. Justice Blackmun, on November 18 renewed their application for a stay.

On November 20 Mr. Justice Blackmun granted petitioners a partial stay of the District Court's order after concluding that the Supreme Court of Nebraska's delay in rendering a definitive decision had exceeded "tolerable limits". (App. pp. 35a, 36a). As Mr. Justice Blackmun observed in his chambers opinion:

"[E]ach passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable. By deferring action until November 25, and possibly later, the Supreme Court of Nebraska has decided, and, so far as the intervening days are concerned, has finally decided, that this restraint on the media will persist. In this sense, delay itself is a final decision." (App. p. 37a).

In granting a partial stay, Mr. Justice Blackmun made, *inter alia*, the following rulings:

(1) That portion of the District Court's order which generally incorporates the aforementioned Nebraska Bar-Press Guidelines was stayed by reason of the fact that the Guidelines

"are merely suggestive and, accordingly, are necessarily vague. . . . I find them on the whole . . . sufficiently riddled with vague and indefinite admonitions—understandably so in view of the basic nature of "guidelines"—that I have concluded that the best and momentary course is to stay their mandatory and wholesale imposition in the present context. The state courts, nonetheless, are free forthwith to reimpose particular provisions included in the Guidelines so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately

specific and in keeping with the remainder of this order." (App. pp. 38a-39a).

(2) Paragraphs 4 and 5 of the District Court's order was stayed by Mr. Justice Blackmun since:

"No persuasive justification has been advanced for those parts of the restrictive order that prohibit the reporting of the details of the crimes, of the identities of the victims, or of the testimony of the pathologist at the preliminary hearing that was open to the public. . . . These facts in themselves do not implicate a particular putative defendant. . . . But until the bare facts concerning the crimes are related to a particular accused, it does not seem to me that their being reported in the media irreparably infringes the accused's right to a fair trial of the issue as to whether he was the one who committed the crimes. There is no necessary implication of the person, who has been named as the accused, in the facts suppressed by paragraphs 4 and 5 of the District Court's restrictive order. . . ." (App. pp. 39a-40a).

(3) The District Court's order's restraints on other aspects of pretrial publicity were not prohibited by Mr. Justice Blackmun, "at least on an application for a stay and at this distance. . . ." (App. p. 40a). Observing that "[r]estrictions limited to pretrial publicity may delay media coverage" but that "at-least they do no more than that," Mr. Justice Blackmun concluded that "certain facts that strongly implicate an accused may be restrained from publication by the media prior to his trial. A confession or statement against interest is the paradigm." (App. p. 40a). Other facts which are possibly implicative of the accused—*e.g.*, "those associated with the circumstances of his arrest", "facts associated with the accused's criminal record, if he has one"; "[c]ertain statements as to the accused's guilt

by those associated with the prosecution"—were held to be potentially proper subjects for restraint prior to the trial if the burden of proof set forth by Mr. Justice Blackmun ("publicizing particular facts will irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt") was satisfied. (App. p. 41a).

Mr. Justice Blackmun concluded his November 20 order by noting that the Supreme Court of Nebraska "may well conclude that other portions of that order are also to be stayed or vacated." (App. p. 42a).

On November 21, petitioners filed a motion with all Justices of this Court to vacate so much of Mr. Justice Blackmun's order dated November 20 as had not stayed the imposition upon the press of the prior restraint on publication.

On November 25 the Supreme Court of Nebraska heard oral argument upon the petitioners' request for a stay of the District Court's order. On December 1 the Nebraska Supreme Court issued a *per curiam* opinion (two judges dissenting on jurisdictional grounds and two others joining the remaining three solely to break what would otherwise have been a procedural deadlock). (App. p. 44a). The Court held as follows:

"We conclude that the order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon freedom of the press. The guidelines were not intended to be contractual and cannot be enforced as if they were.

"The order of the District Court of October 27, 1975, is vacated and is modified and reinstated in the following respects: It shall be effective only as to events which have occurred prior to the release of this opinion, and only as it applies to the relators herein, and

only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interests made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings." (App. pp. 63a-64a).

The Supreme Court of Nebraska also remanded the defendant's request for all future pretrial proceedings to be closed to the District Court with instructions to consider all such applications in the future in accord with A.B.A. Standard 3.1, Fair Trial and Free Press: Pretrial Hearings, which the Court incorporated and adopted in its opinion. (App. pp. 64a-65a).

On December 4 petitioners applied to this Court for a stay of the order of the Supreme Court of Nebraska and further moved this Court to treat the previously filed papers as a Petition for a Writ of Certiorari. On December 8 this Court denied without prejudice the petitioners' motion dated November 21 which sought to vacate in part Mr. Justice Blackmun's stay order dated November 20 insofar as that order expired on December 1, the date of the Supreme Court of Nebraska's order. This Court granted petitioners' motion to treat the previously filed papers as a Petition for a Writ of Certiorari, consideration of which was deferred until additional papers were received by this Court or until the close of business on December 9; consideration was also deferred of the application for a stay of the order of the Supreme Court of Nebraska. (Justices Brennan, Stewart and Marshall would have granted the latter application.) (App. p. 70a).



On December 12, 1975, this Court granted the Petition for a Writ of Certiorari; denied the motion to expedite (Justices Brennan, Stewart and Marshall dissenting); denied the application for a stay (Justices Brennan, Stewart and Marshall dissenting in whole; Justice White dissenting with respect to the publication of information disclosed in public at the preliminary hearing in the *Simants* case); and invited the submission of this Amended Petition for Certiorari. (App. p. 71a).

### Reasons for Granting the Writ

This is the third case to reach this Court within two years involving the constitutionality of prior restraints imposed on the press with respect to its reporting about judicial proceedings. In this case, as in *Times-Picayune Publishing Corp. v. Schulz*, 419 U.S. 1301 (1974), and *Newspapers, Inc. v. Blackwell*, 421 U.S. 997 (1975), the case came before the Court on a motion for a stay, thus presenting the Court with what Mr. Justice Blackmun has referred to as "an issue of profound constitutional implications, demanding immediate resolution. . . ." (App. p. 27a).

While the order now under review would appear to expire at the beginning of the underlying criminal trial, which is now scheduled to commence on January 5, 1976, there is little doubt that unless a decision is reached in this case with respect to the constitutionality of such prior restraints imposed upon publication, the Court will be confronted with a plethora of such cases—invariably arising in the context of hastily briefed motions for a stay which, by their terms, expire quickly enough to raise serious questions of mootness. This is thus a classic example of that exception to the mootness doctrine of "short term orders, capable of repetition, yet evading review . . ." adverted to by the Court in *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), and its progeny. See *Super Tire Engi-*

*neering Co. v. McCorkle*, 416 U.S. 115, 125-26 (1974); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974).

That such a case should arise in the context of a prior restraint on publication makes it all the more urgent that it be heard and decided by the Court. It was once axiomatic to observe, as did Mr. Justice Holmes, that the "main purpose" of the First Amendment was to "prevent all such prior restraints upon publications as had been practiced by other governments. . . ." *Patterson v. Colorado*, 205 U.S. 456, 462 (1907). Such language was repeated by the Court in *Near v. Minnesota*, 283 U.S. 697, 702 (1931), and the extremely narrow exceptions on prior restraints on publication set forth in the national security area in *Near* (e.g., ". . . publication of the sailing dates of transports or the number or location of troops . . .") and *New York Times Co. v. United States*, 403 U.S. 713 (1971), have thus far been the only ones ever receiving the approval of a majority of the Court. As phrased in Mr. Justice Stewart's concurring opinion (joined by Mr. Justice White) in the *New York Times* case, publication could not be enjoined unless it would "surely result in direct, immediate and irreparable damage to our Nation or its people." (403 U.S. at 730.)

There is particular need to avoid the imposition of prior restraints with respect to reporting regarding pending judicial proceedings. This Court has previously noted that it has been, in the area of such reporting, "unwilling to place any direct limitations on the freedom traditionally exercised by the news media." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (emphasis added).<sup>\*</sup> See also, *Younger v.*

<sup>\*</sup> Indeed, the *Sheppard* case set forth in detail a variety of methods available to trial judges which could protect fully a defendant's right to a fair trial under the Sixth Amendment without the imposition of any direct restraints on the media. One of the methods not suggested in *Sheppard* is the blanket closing of courts during preliminary hearings—a method now recommended to the

*Smith*, 30 Cal.App.3d 138, 106 Cal. Rptr. 225 (1973); *Oliver v. Postel*, 30 N.Y.2d 171, 331 N.Y.S.2d 407, 412-13 (1972); *State v. Sperry*, 79 Wash.2d 69, 483 P.2d 608, *cert. denied*, *McCrea v. Sperry*, 404 U.S. 939 (1971); *State v. Rose*, 271 So.2d 483 (D.Ct. App.Fla.2d Dist. 1972). The instant decision of the Supreme Court of Nebraska is inconsistent with all those rulings. It is also inconsistent with four separate bar association reports issued subsequent to *Sheppard*, none of which sanctioned from either a constitutional or policy stance the imposition of any prior restraints on the press in its coverage of the courts.\*

Indeed, so pervasive is the sweep of the Nebraska ruling that it effectively bars publication of much information that was either publicly testified to in open court or is contained in documents publicly filed with those courts. As such, the ban is contrary to the rulings of this Court in such cases as *Craig v. Harney*, 331 U.S. 367, 374 (1947); *Estes v. Texas*, 381 U.S. 532, 541-42 (1965) and the more recent *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) decision.

Finally, there is simply no factual basis for the ban placed on the Nebraska press. The "evidence" produced

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Nebraska lower courts by the decision of the Supreme Court of Nebraska. In this respect as well as those stated above, petitioners believe the Nebraska ruling contravenes well-established constitutional principles. To this date, no such order has been entered. See, e.g., *In Re Oliver*, 333 U.S. 257 (1948); *Phoenix Newspapers Inc. v. Jennings*, 107 Ariz. 557, 490 P.2d 563 (1971).

\* Report of the Committee on the Operation of the Jury System, *The "Free Press-Fair Trial" Issue*, 45 F.R.D. 391, 401-02 (1968); Report of the Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York, *Freedom of the Press and Fair Trial* 10-11 (1967); ABA Advisory Committee on Fair Trial and Free Press, *Standards Relating to Fair Trial and Free Press* 13-14 (Approved Draft, March 1968); ABA Legal Advisory Committee on Fair Trial and Free Press, *Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press* (1975).

to justify the prior restraint could not withstand any constitutional test. The prior restraint is not even made applicable to the entire media but instead binds petitioners alone. For these and other reasons related to the record, the Nebraska Supreme Court order could not in any event be sustained.

## CONCLUSION

For the reasons set forth above, the action of this Court on December 12, 1975 in granting the Petition for a Writ of Certiorari was proper. This Amended Petition is filed in response to the invitation of this Court of that date.

Respectfully submitted,

JAMES L. KOLEY  
STEPHEN T. MCGILL  
MCGILL, KOLEY & PARSONAGE, P.C.  
Suite 300  
10010 Regency Circle  
Omaha, Nebraska 68114  
*Attorneys for Petitioners*

December 24, 1975

**APPENDIX**



**Order of the Court**

[October 22, 1975]

**IN THE  
COUNTY COURT  
OF LINCOLN COUNTY, NEBRASKA**

---

STATE OF NEBRASKA,

*Plaintiff,*

vs.

ERWIN CHARLES SIMANTS,

*Defendant.*

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Under our constitution due process requires that the accused receive a trial by impartial jury free from outside influences. The power and the persuasiveness of the news media are of such significance that Courts must at times take strong actions to insure that both parties in a criminal law suit start equally. Prosecution in this case has made a motion for a protective order with respect to pretrial publicity. The defense has joined in that motion.

In order to guarantee the constitutional rights of the defendant and at the same time to protect the interests of the State of Nebraska, the Court would therefore find that:

there is a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury in the event that the defendant is bound over to the District Court for trial in the matter now pending before this Court.

*Order of the Court*

IT IS THEREFORE THE ORDER OF THIS COURT that no parties to this action, nor any attorney connected with this case as defense counsel or prosecution, nor any other attorney, nor any judicial officer or employee, nor any public official, nor any sheriff, nor any agent, deputy or employee of any such persons, nor any witnesses having appeared at the preliminary hearing in this matter, nor any person subpoenaed to testify at the trial of this matter, nor any other person present in Court, shall release or authorize the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing.

IT IS FURTHER ORDERED that no party to this case, law enforcement official, public officer, attorney, witnesses or news media disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation, a copy of which is attached hereto and made a part hereof.

This Order does not include the following:

1. Factual statements of the accused person's name, age, residence, occupation, and family status.
2. The circumstances of the arrest, namely, the time and place of the arrest, the identity of the arresting and investigating officers and agencies, and the length of the investigation.
3. The nature, substance, and text of the charge, including a brief description of the offenses charged.

*Order of the Court*

4. Quotations from, or any reference without comment to, public records of the Court in the case, or to other public records or communications heretofore disseminated to the public.

5. The scheduling and result of any stage of the judicial proceeding held in open court in an open or public session.

6. A request for assistance in obtaining evidence.

7. A request for assistance in the obtaining of evidence or the names of possible witnesses.

The court being mindful of the public's right to know and the guaranties of the Constitution of the United States and the State of Nebraska to a free press, the court does therefore order that a copy of the preliminary hearing proceedings be made available to the public at the expiration of this order.

In accordance with this order, the court hereby grants the County Attorney's and Defendant's motion for a restrictive order and denies that portion of the defendant's motion requesting a closed hearing. This order to remain in effect until modified or rescinded by a higher court or until the defendant is ordered released from these charges.

BY THE COURT:

/s/ RONALD A. RUFF  
Ronald A. Ruff  
County Judge

October 22, 1975

(Seal)

*Order of the Court*

**NEBRASKA BAR-PRESS GUIDELINES FOR  
DISCLOSURE AND REPORTING OF INFORMATION  
RELATING TO IMMINENT OR PENDING CRIMINAL  
LITIGATION**

These voluntary guidelines reflect standards which bar and news media representatives believe are a reasonable means of accommodating, on a voluntary basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial. They are not intended to prevent the news media from inquiring into and reporting on the integrity, fairness, efficiency and effectiveness of law enforcement, the administration of justice, or political or governmental questions whenever involved in the judicial process.

As a voluntary code, these guidelines do not necessarily reflect in all respects what the members of the bar or the news media believe would be permitted or required by law.

**Information Generally Appropriate for Disclosure,  
Reporting**

Generally, it is appropriate to disclose and report the following information:

1. The arrested person's name, age, residence, employment, marital status and similar biographical information.
2. The charge, its text, any amendments thereto, and, if applicable, the identity of the complainant.
3. The amount or conditions of bail.
4. The identity of and biographical information concerning the complaining party and victim, and, if a death

*Order of the Court*

is involved, the apparent cause of death unless it appears that the cause of death may be a contested issue.

5. The identity of the investigating and arresting agencies and the length of the investigation.

6. The circumstances of arrest, including time, place, resistance, pursuit, possession of and all weapons used, and a description of the items seized at the time of arrest. It is appropriate to disclose and report at the time of seizure the description of physical evidence subsequently seized other than a confession, admission or statement. It is appropriate to disclose and report the subsequent finding of weapons, bodies, contraband, stolen property and similar physical items if, in view of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial.

7. Information disclosed by the public records, including all testimony and other evidence adduced at the trial.

**Information Generally Not Appropriate for Disclosure,  
Reporting**

Generally, it is not appropriate to disclose or report the following information because of the risk of prejudice to the right of an accused to a fair trial:

1. The existence or contents of any confession, admission or statement given by the accused, except it may be stated that the accused denies the charges made against him. This paragraph is not intended to apply to statements made by the accused to representatives of the news media or to the public.



*Order of the Court*

2. Opinions concerning the guilt, the innocence or the character of the accused.

3. Statements predicting or influencing the outcome of the trial.

4. Results of any examination or tests or the accused's refusal or failure to submit to an examination or test.

5. Statements or opinions concerning the credibility or anticipated testimony of prospective witnesses.

6. Statements made in the judicial proceedings outside the presence of the jury relating to confessions or other matters which, if reported, would likely interfere with a fair trial.

*Prior Criminal Records*

Lawyers and law enforcement personnel should not volunteer the prior criminal records of an accused except to aid in his apprehension or to warn the public of any dangers he presents. The news media can obtain prior criminal records from the public records of the courts, police agencies and other governmental agencies and from their own files. The news media acknowledge, however, that publication or broadcast of an individual's criminal record can be prejudicial, and its publication or broadcast should be considered very carefully, particularly after the filing of formal charges and as the time of the trial approaches, and such publication or broadcast should generally be avoided because readers, viewers and listeners are potential jurors and an accused is presumed innocent until proven guilty.

*Order of the Court**Photographs*

1. Generally, it is not appropriate for law enforcement personnel to deliberately pose a person in custody for photographing or televising by representatives of the news media.

2. Unposed photographing and televising of an accused outside the courtroom is generally appropriate, and law enforcement personnel should not interfere with such photographing or televising except in compliance with an order of the court or unless such photographing or televising would interfere with their official duties.

3. It is appropriate for law enforcement personnel to release to representatives of the news media photographs of a suspect or an accused. Before publication of any such photographs, the news media should eliminate any portions of the photographs that would indicate a prior criminal offense or police record.

*Continuing Committee for Cooperation*

The members of the bar and the news media recognize the desirability of continued joint efforts in attempting to resolve any areas of differences that may arise in their mutual objective of assuring to all Americans both the correlative constitutional rights to freedom of speech and press and to a fair trial. The bar and the news media, through their respective associations, have determined to establish a permanent committee to revise these guidelines whenever this appears necessary or appropriate, to issue opinions as to their application to specific situations, to receive, evaluate and make recommendations with re-

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*Order of the Court*

spect to complaints and to seek to effect through educational and other voluntary means a proper accommodation of the constitutional correlative rights of free speech, free press and fair trial.

June, 1970

9a

**Order of the Court**

[October 27, 1975]

Case No. B-2904

IN THE

DISTRICT COURT

IN AND FOR LINCOLN COUNTY, NEBRASKA

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THE STATE OF NEBRASKA,

*Plaintiff,*

vs.

ERWIN CHARLES SIMANTS,

*Defendant.*

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Now on this 27th day of October, 1975, the same being one of the regular days of the September, 1975 term of the District Court in and for Lincoln County, Nebraska, the above entitled case comes on for determination of the defendant's motion for a continuation of the Lincoln County Court's order with respect to pre-trial publicity.

THE COURT, BEING DULY INFORMED, FINDS because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial and that an order setting forth the limitations of pre-trial publicity is appropriate, and an order for the news media and public's accommodation to physical facilities is appropriate.

IT IS THEREFORE ORDERED that the Order of the Lincoln County Court which was adopted by this Court October 23, 1975 is hereby terminated.

*Order of the Court*

THE COURT FURTHER ORDERS that pre-trial publicity shall be in accordance with the following order:

The standards set forth in The Nebraska Bar-Press Guidelines for Disclosing and Reporting of Information Relating to Imminent or Pending Criminal Litigation are approved and are hereby adopted as the Court Order for dissemination of information in this case: that a copy of such guidelines is attached hereto and by this reference made a part hereof. Such guidelines should be clarified as follows:

1. It is hereby stated the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing is "pre-trial" publicity.

2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it.

3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported.

4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at the careful discretion of the press. The testimony of

*Order of the Court*

this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.

5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported.

6. The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported.

In keeping with the physical facilities of the Lincoln County Courthouse, the Court orders the following:

1. No photographs will be taken on the third or fourth floors of the Lincoln County Courthouse at any time during the conduct of this case.

2. The main hall on the third floor of the Lincoln County Courthouse will be cleared of all personnel while the jury is moving in or out of the courtroom. When the jury is excused during the conduct of the case, all counsel, news media personnel, spectators, or other persons present in the courtroom will remain seated until the jury has left the courtroom and cleared the main third floor hallway.



*Order of the Court*

This order will remain in effect until further order of the court or until completion of this case.

BY THE COURT:

/s/ HUGH STUART  
HUGH STUART  
District Judge

*Order of the Court*

NEBRASKA BAR-PRESS GUIDELINES FOR  
DISCLOSURE AND REPORTING OF INFORMATION  
RELATING TO IMMINENT OR PENDING CRIMINAL  
LITIGATION

These voluntary guidelines reflect standards which bar and news media representatives believe are a reasonable means of accommodating, on a voluntary basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial. They are not intended to prevent the news media from inquiring into and reporting on the integrity, fairness, efficiency and effectiveness of law enforcement, the administration of justice, or political or governmental questions whenever involved in the judicial process.

As a voluntary code, these guidelines do not necessarily reflect in all respects what the members of the bar or the news media believe would be permitted or required by law.

Information Generally Appropriate for Disclosure,  
Reporting

Generally, it is appropriate to disclose and report the following information:

1. The arrested person's name, age, residence, employment, marital status and similar biographical information.
2. The charge, its text, any amendments thereto, and, if applicable, the identity of the complainant.
3. The amount or conditions of bail.
4. The identity of and biographical information concerning the complaining party and victim, and, if a death

*Order of the Court*

is involved, the apparent cause of death unless it appears that the cause of death may be a contested issue.

5. The identity of the investigating and arresting agencies and the length of the investigation.

6. The circumstances of arrest, including time, place, resistance, pursuit, possession of and all weapons used, and a description of the items seized at the time of arrest. It is appropriate to disclose and report at the time of seizure the description of physical evidence subsequently seized other than a confession, admission or statement. It is appropriate to disclose and report the subsequent finding of weapons, bodies, contraband, stolen property and similar physical items if, in view of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial.

7. Information disclosed by the public records, including all testimony and other evidence adduced at the trial.

Information Generally Not Appropriate for Disclosure,  
Reporting

Generally, it is not appropriate to disclose or report the following information because of the risk of prejudice to the right of an accused to a fair trial:

1. The existence or contents of any confession, admission or statement given by the accused, except it may be stated that the accused denies the charges made against him. This paragraph is not intended to apply to statements made by the accused to representatives of the news media or to the public.

*Order of the Court*

2. Opinions concerning the guilt, the innocence or the character of the accused.

3. Statements predicting or influencing the outcome of the trial.

4. Results of any examination or tests or the accused's refusal or failure to submit to an examination or test.

5. Statements or opinions concerning the credibility or anticipated testimony of prospective witnesses.

6. Statements made in the judicial proceedings outside the presence of the jury relating to confessions or other matters which, if reported, would likely interfere with a fair trial.

*Prior Criminal Records*

Lawyers and law enforcement personnel should not volunteer the prior criminal records of an accused except to aid in his apprehension or to warn the public of any dangers he presents. The news media can obtain prior criminal records from the public records of the courts, police agencies and other governmental agencies and from their own files. The news media acknowledge, however, that publication or broadcast of an individual's criminal record can be prejudicial, and its publication or broadcast should be considered very carefully, particularly after the filing of formal charges and as the time of the trial approaches, and such publication or broadcast should generally be avoided because readers, viewers and listeners are potential jurors and an accused is presumed innocent until proven guilty.

*Order of the Court**Photographs*

1. Generally, it is not appropriate for law enforcement personnel to deliberately pose a person in custody for photographing or televising by representatives of the news media.

2. Unposed photographing and televising of an accused outside the courtroom is generally appropriate, and law enforcement personnel should not interfere with such photographing or televising except in compliance with an order of the court or unless such photographing or televising would interfere with their official duties.

3. It is appropriate for law enforcement personnel to release to representatives of the news media photographs of a suspect or an accused. Before publication of any such photographs, the news media should eliminate any portions of the photographs that would indicate a prior criminal offense or police record.

*Continuing Committee for Cooperation*

The members of the bar and the news media recognize the desirability of continued joint efforts in attempting to resolve any areas of differences that may arise in their mutual objective of assuring to all Americans both the correlative constitutional rights to freedom of speech and press and to a fair trial. The bar and the news media, through their respective associations, have determined to establish a permanent committee to revise these guidelines whenever this appears necessary or appropriate, to issue opinions as to their application to specific situations, to receive, evaluate and make recommendations with re-

*Order of the Court*

spect to complaints and to seek to effect through educational and other voluntary means a proper accommodation of the constitutional correlative rights of free speech, free press and fair trial.

June, 1970



*Order of the Court*

## CERTIFICATE

STATE OF NEBRASKA,  
COUNTY OF LINCOLN, SS.:

I, the undersigned, Clerk of the District Court of Lincoln County, Nebraska, do hereby certify that the above and foregoing is a full, true and correct copy of "Order" entered by the Court on the 27th day of October, 1975, in the above entitled matter, as the same appears of record in said Court.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court on this 3rd day of November, 1975.

/s/ VIRGINIA BURKE, DEPUTY  
CLERK OF THE DISTRICT COURT

November 3, 1975

Attest and Certification Is True Copy

I. L. BOYLE  
Clerk of the District Court  
By V. BURKE, DEPUTY

**Per Curiam Statement**

[November 10, 1975]

STATE OF NEBRASKA, ex rel. NEBRASKA PRESS ASSOCIATION;  
OMAHA WORLD-HERALD COMPANY, et al.,

*Relators,*

v.

THE HONORABLE HUGH STUART, JUDGE, DISTRICT OF  
LINCOLN COUNTY, NEBRASKA,

*Respondent.*

## PER CURIAM.

The relators have petitioned this court for leave to file their petition for a writ of mandamus or other appropriate relief, directing the respondent District Judge, the Honorable Hugh Stuart, of the District Court for Lincoln County, Nebraska, to forthwith vacate an order of the District Court for Lincoln County, dated October 27, 1975, relating to the publication of pretrial publicity in the case of State of Nebraska v. Erwin Charles Simants.

During our consideration of the application and the request for stay of the order, we are reliably informed that the relators have filed with the Supreme Court of the United States an application or a request that that court act to accomplish the same purposes to be accomplished by their request to us to exercise our original jurisdiction.

The existence of the two concurrent applications could put this court in the position of exercising parallel jurisdiction with the Supreme Court of the United States. We

*Per Curiam Statement*

deem this inadvisable. Accordingly, the matter is continued until the Supreme Court of the United States has made known whether or not it will accept jurisdiction in the matter.

**On Application for Stay**

[November 13, 1975]

**SUPREME COURT  
OF THE UNITED STATES**

No. A-426

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NEBRASKA PRESS ASSOCIATION et al.;

*Applicants,*

v.

HUGH STUART, Judge, District Court of Lincoln County,  
Nebraska.

---

MR. JUSTICE BLACKMUN, Circuit Justice.

This is an application for stay of an order of the District Court of Lincoln County, Neb., that restricts coverage by the media of details concerning alleged sexual assaults upon and murders of six members of a family in their home in Sutherland, Neb.; concerning the investigation and development of the case against the accused; and concerning the forthcoming trial of the accused. The applicants are Nebraska newspaper publishers, national news-wire services, media associations, a radio station, and employees of these entities.

The accused is the subject of a complaint filed in the County Court of Lincoln County, Neb., on October 19, 1975. The complaint was amended on October 22 and, as so amended, charged the accused with having perpetrated the assaults and murders on October 18. On October 21, the prosecution filed with the County Court a motion for a re-

*On Application for Stay*

strictive order. This motion alleged "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial should the defendant be bound over to trial in the District Court if testimony of witnesses at the preliminary hearing is reported to the public." The defense joined in the prosecution's request, and also moved that the preliminary hearing be closed to the public and the press.

Refusing the latter request, the County Court held an open preliminary hearing on October 22. On that day it bound the accused over to the District Court. It, however, did issue a protective order. The Court found that there was "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury." The Court then ordered that no party to the action, no attorney connected with the defense or prosecution, no judicial officer or employee, and no witness or "any other person present in Court" was to "release or authorize the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing." It went on to order that no "news media disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation." Excepted, however, were (1) factual statements of the accused's name, age, residence, occupation, and family status; (2) the circumstances of the arrest (time and place, identity of the arresting and investigating officers and agencies, and the length of the investigation); (3) the nature, substance and text of the charge; (4) quotations from, or any

*On Application for Stay*

reference without comment to, public records or communications heretofore disseminated to the public; (5) the scheduling and result of any stage of the judicial proceeding held in open court; (6) a request for assistance in obtaining evidence; and (7) a request for assistance in obtaining the names of possible witnesses. The Court also ordered that a copy of the preliminary hearing proceedings was to be made available to the public at the expiration of the order.

A copy of the Bar-Press Guidelines was attached to the court's order and was incorporated in it by reference. In their preamble the Guidelines are described as a "voluntary code." They speak of what is "generally" appropriate or inappropriate for the press to disclose or report. The identity of the defendant, and also the victim, may be reported, along with biographical information about them. The circumstances of the arrest may be disclosed, as may the evidence against the defendant, "if, in view of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial." Confessions or other statements of the accused may not be disclosed, unless they have been made "to representatives of the press or to the public." Also barred from disclosure are opinions as to the guilt of the accused, predictions of the outcome of trial, results of examinations and tests, statements concerning the anticipated testimony of witnesses, and statements made in court but out of the presence of the jury "which, if reported, would likely interfere with a fair trial." The media are instructed by the Guidelines that the reporting of an accused's prior criminal record "should be considered very carefully" and "should generally be avoided." Photographs are permis-



*On Application for Stay*

sible provided they do not "deliberately pose a person in custody."

The petitioners forthwith applied to the District Court of Lincoln County for vacation of the County Court's order. The defense, in turn, moved for continuation of the order and that all future proceedings in the case be closed. The respondent, as judge of the District Court, granted a motion by the petitioners to intervene in the case. On October 27 he terminated the County Court's order and substituted his own. By its order of that date the District Court found that "there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." It ordered that the pretrial publicity in the case be in accord with the above-mentioned Guidelines as "clarified by the court." The clarification provisions were to the effect that the trial of the case commences when a jury is impaneled and that all reporting prior to that event was pretrial publicity; that it appeared that the defendant had made a statement or confession "and it is inappropriate to report the existence of such statement or the contents of it"; that it appeared that the defendant may have made statements against interest to three named persons and may have left a note "and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported"; that the testimony of the pathologist witness "dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported"; that "the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be

*On Application for Stay*

reported"; that the "exact nature of the limitations of publicity as entered by this order will not be reported," that is to say, "the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported."

The petitioners then sought from the District Court a stay of its order. Not receiving relief there, they applied to the Supreme Court of Nebraska for an immediate stay and also for leave to commence an original action in the nature of mandamus and/or prohibition to vacate the District Court order of October 27. On November 4, counsel for the petitioners was advised by the Clerk of the Supreme Court that under that court's rules "all motions must be noticed for a day certain when the court is regularly in session," and that the "next date for submission of such a matter will be Monday, December 1, 1975, and I suggest that your motion be noticed for that date."

On November 5, the petitioners, reciting that the "District Court and the Nebraska Supreme Court have declined to act on the requested relief," filed with this Court, directed to me as Circuit Justice, the present application for stay of the order of the District Court in and for Lincoln County, Neb. Because of the obvious importance of the issue and the need for immediate action, and because of the apparent similarity of the facts to those that confronted Mr. JUSTICE POWELL as Circuit Justice, in the case of *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301 (1974), I asked for prompt responses. That request has been honored and responses respectively were received on November 10 and 11 from the Attorney General of Nebraska on behalf of the respondent judge, from the Lin-

*On Application for Stay*

coln County attorney on behalf of the State, and from counsel for the accused.

I was advised yesterday, however, that on November 10 the Supreme Court of Nebraska issued a *per curiam* statement reciting that the applicants have petitioned that court for leave to file their petition for a writ of mandamus or other appropriate relief with respect to the District Court order of October 27, and further reciting that during that court's "consideration of the application and the request for stay of the order, we are reliably informed that the relators have filed with the Supreme Court of the United States an application or a request that that court act to accomplish the same purposes to be accomplished by their request to us to exercise our original jurisdiction," and then providing:

"The existence of the two concurrent applications could put this court in the position of exercising parallel jurisdiction with the Supreme Court of the United States. We deemed this inadvisable. Accordingly, the matter is continued until the Supreme Court of the United States has made known whether or not it will accept jurisdiction in the matter."

The issue raised is one that centers upon cherished First and Fourteenth Amendment values. Just as Mr. JUSTICE POWELL observed in *Times-Picayune*, 419 U.S., at 1305, the case "presents a fundamental confrontation between the competing values of fair press and fair trial, with significant public and private interests balanced on both sides." The order in question obviously imposes significant prior restraints on media reporting. It therefore comes to me "bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United*

*On Application for Stay*

*States*, 403 U.S. 713, 714 (1971). But we have also observed that the media may be prohibited from publishing information about trials if the restriction is "necessary to assure a defendant a fair trial before an impartial tribunal." *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972). See *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S., at 1307; *Newspapers, Inc. v. Blackwell*, 421 U.S. 997 (1975).

It is apparent, therefore, that if no action on the petitioners' application to the Supreme Court of Nebraska could be anticipated before December 1, as the above described communication from that court's clerk intimated, a definitive decision by the State's highest court on an issue of profound constitutional implications, demanding immediate resolution, would be delayed for a period so long that the very day-by-day duration of that delay would constitute and aggravate a deprivation of such constitutional rights, if any, that the petitioners possess and may properly assert. Under those circumstances, I would not hesitate promptly to act.

It appears to me, however, from the Nebraska court's *per curiam* statement that it was already considering the petitioners' application and request for stay that had been submitted to that tribunal. That court deferred decision, it says, because of the pendency of the similar application before me, and because it deemed inadvisable simultaneous consideration of the respective applications in Nebraska and here in Washington. Accordingly, the matter was "continued" until it was known whether I would act.

It is highly desirable, of course, that the issue, concerning, as it does, an order by a Nebraska state court, should be decided in the first instance by the Supreme Court of Nebraska, and that the pendency of the application before me should not be deemed to stultify that court

*On Application for Stay*

in the performance of its appropriate constitutional duty. The application, after all, was submitted to me on the assumption that action by the Nebraska court would not be forthcoming until after a submission to be scheduled no earlier than December 1 and on the further assumption that the District Court's order satisfied the requirements of 28 U. S. C. § 1257. On the expectation, which I think is now clear and appropriate for me to have, that the Supreme Court of Nebraska, forthwith and without delay, will entertain the petitioners' application made to it, and will promptly decide it in the full consciousness that "time is of the essence." I hereby give the Supreme Court of Nebraska that assurance it desired that, at least for the immediate present, I neither issue nor finally deny a stay on the papers before me. My inaction, of course, is without prejudice to the petitioners to reapply to me should prompt action not be forthcoming.

**Order for Hearing and Order to Show Cause**

[November 18, 1975]

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 No. 40471.

 STATE OF NEBRASKA ex rel.  
 NEBRASKA PRESS ASSOCIATION, et al.,
*Relators,*

v.

 THE HONORABLE HUGH STUART, JUDGE, DISTRICT COURT OF  
 LINCOLN COUNTY, NEBRASKA,
*Respondent.*


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 No. 40445.

STATE OF NEBRASKA,

*Plaintiff,*

v.

ERWIN CHARLES SIMANTS,

*Defendant.*


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The relators did on the afternoon of Friday, October 31, 1975, petition this court for leave to file their petition for a writ of mandamus or other appropriate relief, asking us to direct the respondent District Judge, the Honorable Hugh Stuart, of the District Court for Lincoln County, Nebraska, to forthwith vacate an order of the District Court for Lincoln County, dated October 27, 1975, relating to the publication of pretrial publicity in the case of State of Nebraska v. Erwin Charles Simants.

On November 4, 1975, in the case of State of Nebraska v. Erwin Charles Simants in the District Court for Lincoln



*Order for Hearing and Order to Show Cause*

County, Nebraska, the interveners therein, being the same persons as the relators in the application referred to in the preceding paragraph, filed notice of direct appeal from the order of the Honorable Hugh Stuart of October 27, 1975, and that appeal is now docketed in this court as No. 40445. Also on November 4, 1975, the interveners filed in No. 40445, a motion to advance the appeal in accordance with Rule 17, Revised Rules of the Supreme Court of the State of Nebraska, 1974, which motion also requests that order of October 27, 1975, be stayed pending a hearing on the merits.

On November 5, 1975, the relators and the interveners filed in the Supreme Court of the United States an application, directed to Mr. Justice Blackmun, as circuit justice, for stay of the order of October 27, 1975, of the Honorable Hugh Stuart.

The effect of the foregoing actions of the relators and interveners was that on November 5, 1975, they had simultaneously pending in this court two proceedings and in the Supreme Court of the United States one proceeding, each of which had the same ultimate objective, namely, vacation of the order of October 27, 1975.

On November 11, 1975, this court in the matter referred to in the first paragraph of this order entered an order in part as follows: "During our consideration of the application and the request for stay of the order, we are reliably informed that the relators have filed with the Supreme Court of the United States an application for a request that that court act to accomplish the same purposes to be accomplished by their request to us to exercise our original jurisdiction.

"The existence of the two concurrent applications could put this court in the position of exercising parallel juris-

*Order for Hearing and Order to Show Cause*

diction with the Supreme Court of the United States. We deem this inadvisable. Accordingly, the matter is continued until the Supreme Court of the United States has made known whether or not it will accept jurisdiction in the matter."

On November 13, 1975, the interveners caused to be filed in this court the bill of exceptions in No. 40445.

On November 13, 1975, Mr. Justice Blackmun, acting upon the application for stay directed to him, rendered an opinion in part as follows: "It is highly desirable, of course, that the issue, concerning, as it does, an order by a Nebraska state court, should be decided in the first instance by the Supreme Court of Nebraska, and that the pendency of the application before me should not be deemed to stultify that court in the performance of its appropriate constitutional duty. The application, after all, was submitted to me on the assumption that action by the Nebraska court would not be forthcoming until after a submission to be scheduled no earlier than December 1 and on the further assumption that the District Court's order satisfied the requirements of 28 U.S.C. § 1257. On the expectation, which I think is now clear and appropriate for me to have, that the Supreme Court of Nebraska, forthwith and without delay, will entertain the petitioners' application made to it, and will promptly decide it in the full consciousness that 'time is of the essence,' I hereby give the Supreme Court of Nebraska that assurance it desired that, at least for the immediate present, I neither issue nor finally deny a stay on the papers before me."

The assumption referred to in the quoted portion of the opinion of Mr. Justice Blackmun that action by this court would not be forthcoming until December 1, 1975, is erroneous and apparently is based upon a misunderstanding on

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the part of the relators and interveners' counsel. Only the motion to advance the appeal in No. 40445 is subject to Rule 12 b, Revised Rules of the Supreme Court of the State of Nebraska, 1974, pertaining to hearing "on the first day of a regular session," and that rule contains provisions for exceptions "under special circumstances."

Action upon application for leave to file an original action is not subject to Rule 12 b and it has been the uniform practice of this court to act upon such applications upon due consideration and following a report made by one of the members of this court to the entire court. This report was in process of preparation when the application of the relators was filed in the Supreme Court of the United States as above mentioned. Rule 2 a 2, Revised Rules of the Supreme Court of the State of Nebraska, 1974, provides for oral argument on applications only when ordered by this court.

The nature of the issues in this case indicate that oral argument is advisable. Procedural due process requires that we not act summarily upon an order of stay as the relator seemingly desires, but that all of the interested parties, to wit, Erwin Charles Simants, defendant in No. 40445; the State of Nebraska; and the Honorable Hugh Stuart, respondent in the proposed original action, be given an opportunity to be heard along with the relators.

The court finds that the application of the relators to commence an original action in this court should be granted.

The court further finds that the motion of Nebraska Press Association, the Omaha World Herald Company, the Journal Star Printing Company, the West Publishing Company, North Platte Broadcasting Company, Nebraska Broadcasting Association, Associated Press, United Press International, and Sigma Delta Chi, hereinafter referred to as

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petitioners for an order staying the enforcement of the order of the District Court of Lincoln County, Nebraska, dated October 27, 1975, relating to pre-trial publicity, should be heard and considered at the same time as the application of the relators in State ex rel. Nebraska Press Association et al. v. The Honorable Hugh Stuart, for a stay order.

It is therefore ordered that the application of the relators for leave to file an original action in this court is sustained and the clerk is directed to file the petition tendered by the relators.

It is further ordered that the application of the relators for an order staying the enforcement of the order of the District Court of Lincoln County, Nebraska, in State of Nebraska v. Erwin Charles Simants, dated October 27, 1975, relating to pre-trial publicity in that case, is set for hearing before this court at 10 a.m., on Tuesday, November 25, 1975.

It is further ordered that the motion of the petitioners in the original action for an order staying the enforcement of the order of the District Court of Lincoln County, Nebraska, dated October 27, 1975, relating to pre-trial publicity is also set for hearing at 10 a.m., on Tuesday, November 25, 1975.

It is further ordered that a copy of this order be served forthwith upon the counsel for the relators, the respondent, the Attorney General of the State of Nebraska, the County Attorney of Lincoln County, Nebraska, and the Public Defender of Lincoln County, Nebraska.

It is further ordered that counsel and each of them are invited and directed to appear before this court at 10 a.m. on Tuesday, November 25, 1975, and present argument as to whether the application of the relators for a stay order should be granted. Counsel may also present argument as

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to whether this court has jurisdiction to grant any of the relief requested by relators. We request that particular attention be directed to the question of whether the order of October 27, 1975, is either absolutely void or erroneous.

Counsel are invited to present argument as to whether the petitioners have standing in case No. 40445 to request an order to stay the enforcement of the order of the District Court relating to pre-trial publicity.

Leave to file type-written briefs on or before 10 a.m., November 25, 1975, is granted.

**On Reapplication for Stay****SUPREME COURT  
OF THE UNITED STATES**

No. A-426

[November 20, 1975]

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NEBRASKA PRESS ASSOCIATION et al.,*Applicants,*

v.

HUGH STUART, Judge, District Court of Lincoln County,  
Nebraska

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MR. JUSTICE BLACKMUN, Circuit Justice.

An application for stay of the order dated October 27, 1975, of the District Court of Lincoln County, Neb., resulted in my issuance of a chambers opinion, as Circuit Justice, on November 13. In that opinion I indicated that the issue raised is one that centers upon cherished First and Fourteenth Amendment values; that the challenged state court order obviously imposes significant prior restraints on media reporting; that it therefore came to me "bearing a heavy presumption against its constitutional validity," *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); that if no action on the application to the Supreme Court of Nebraska could be anticipated before December 1, there would be a delay "for a period so long that the very day-by-day duration of that delay would constitute and aggravate a deprivation of such constitutional rights, if any, that the applicants possess and may properly



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assert"; that, however, it was highly desirable that the issue should be decided in the first instance by the Supreme Court of Nebraska; and that "the pendency of the application before me should not be deemed to stultify that court in the performance of its appropriate constitutional duty." I stated my expectation that the Supreme Court of Nebraska will entertain, "forthwith and without delay," the application pending before it, "and will promptly decide it in the full consciousness that 'time is of the essence'." I refrained from either issuing or finally denying a stay on the papers before me. That, however, was without prejudice to the applicants to reapply to me should prompt action not be forthcoming. The applicants have now renewed their application for a stay.

One full week has elapsed since my chambers opinion was filed. No action has been taken by the Supreme Court of Nebraska during that week. The clerk of that court has stated, however, that the applicants have been allowed to docket their original application by way of mandamus to stay the order of the District Court of Lincoln County, and that the matter is set for hearing before the Supreme Court of Nebraska on November 25.

Whether the Nebraska court will reach a definitive decision on November 25, or very shortly thereafter, I do not know. Obviously at least 12 days will have elapsed, without action, since the filing of my chambers opinion, and more than 4 weeks since the entry of the District Court's restrictive order. I have concluded that this exceeds tolerable limits. Accordingly, subject to further order of this Court, and subject to such refinement action as the Supreme Court of Nebraska may ultimately take on the application pending before it, I issue a partial stay.

*On Reapplication for Stay*

A question is initially raised as to my power and jurisdiction to grant a stay. As a single Justice, I clearly have the authority to grant a stay of a state court's "final judgment or decree" that is subject to review by this Court on writ of certiorari. 28 U.S.C. §§ 2101(f) and 1257(3). Respondents to the application for a stay have objected that there is no such "final judgment or decree" upon which I may act. The issue is not without difficulty, for the Supreme Court of Nebraska gives promise of reviewing the District Court's decision, and in that sense the lower court's judgment is not one of the State's highest court, nor is its decision the final one in the matter. Where, however, a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable. By deferring action until November 25, and possibly later, the Supreme Court of Nebraska has decided, and, so far as the intervening days are concerned, has finally decided, that this restraint on the media will persist. In this sense, delay itself is a final decision. I need not now hold that in any area outside that of prior restraint on the press, such delay would warrant a stay or even be a violation of federal rights. Yet neither can I accept that this Court, or any individual Justice thereof, is powerless to act upon the failure of a State's highest court to lift what appears to be, at least in part, an unconstitutional restraint of the press. When a reasonable time in which to review the restraint has passed, as here, we may properly regard the state court as having finally decided that the restraint should remain in effect during the period of delay. I there-

*On Reapplication for Stay*

fore conclude that I have jurisdiction to act upon that state court decision.

I shall not repeat the facts of the case. They were set forth in my chambers opinion of November 13. Neither shall I pause again to elaborate on this Court's acute sensitivity to the vital and conflicting interests that are at stake here. There is no easy accommodation of those interests, and it certainly is not a task that one prefers to take up without the benefit of the participation of all members of the Court. Still, the likelihood of irreparable injury to First Amendment interests requires me to act. When such irreparable injury is threatened, and it appears that there is a significant possibility that this Court would grant plenary review and reverse, at least in part, the lower court's decision, a stay may issue. *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974). Taking this approach to the facts before me, I grant the requested stay to the following extent:

1. The most troublesome aspect of the District Court's restrictive order is its wholesale incorporation of the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation. Without rehearsing the description of those guidelines set forth in my prior opinion, it is evident that they comprise a "voluntary code" which was not intended to be mandatory. Indeed, the word "guidelines" itself so indicates. They are merely suggestive and, accordingly, are necessarily vague. To cite only one example, they state that the publication of an accused's criminal record "should be considered very carefully" and "should generally be avoided." These phrases do not provide the substance of a permissible court order in the First Amendment area. If a member of the press is to go to jail for reporting

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news in violation of a court order, it is essential that he disobey a more definite and precise command than one that he consider his act "very carefully." Other parts of the incorporated Guidelines are less vague and indefinite. I find them on the whole, however, sufficiently riddled with vague and indefinite admonitions — understandably so in view of the basic nature of "guidelines" — that I have concluded that the best and momentary course is to stay their mandatory and wholesale imposition in the present context. The state courts, nonetheless, are free forthwith to reimpose particular provisions included in the Guidelines so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately specific and in keeping with the remainder of this order. That portion of the restrictive order that generally incorporates the Guidelines is hereby stayed.

2. No persuasive justification has been advanced for those parts of the restrictive order that prohibit the reporting of the details of the crimes, of the identities of the victims, or of the testimony of the pathologist at the preliminary hearing that was open to the public. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487-497 (1975). These facts in themselves do not implicate a particular putative defendant. To be sure, the publication of the facts may disturb the community in which the crimes took place and in which the accused, presumably, is to be tried. And their public knowledge may serve to strengthen the resolve of citizens, when so informed, who will be the accused's prospective jurors, that someone should be convicted for the offenses. But until the bare facts concerning the crimes are related to a particular accused, it does not seem to me that their being reported in the media irreparably infringes



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the accused's right to a fair trial of the issue as to whether he was the one who committed the crimes. There is no necessary implication of the person, who has been named as the accused, in the facts suppressed by paragraphs 4 and 5 of the District Court's restrictive order, and to that extent the order is hereby stayed.

3. At the same time I cannot, and do not, at least on an application for a stay and at this distance, impose a prohibition upon the Nebraska courts from placing any restrictions at all upon what the media may report prior to trial. Restraints of this kind are not necessarily and in all cases invalid. See *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972); *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S., at 1307; *Newspapers, Inc. v. Blackwell*, 421 U.S. 997 (1975). I am particularly conscious of the fact that the District Court's order applies only to the period prior to the impaneling, and presumably the sequestration, of a jury at the forthcoming trial. Most of our cases protecting the press from restrictions on what they may report concern the trial phase of the criminal prosecution, a time when the jurors and witnesses can be otherwise shielded from prejudicial publicity, and also a time when both sides are being heard. See, e.g., *Craig v. Harney*, 331 U.S. 367 (1947); *Pennkamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941). Restrictions limited to pretrial publicity may delay media coverage—and, as I have said, delay itself may be impermissible—but at least they do no more than that.

I therefore conclude that certain facts that strongly implicate an accused may be restrained from publication by the media prior to his trial. A confession or statement against interest is the paradigm. See *Rideau v. Louisiana*,

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373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961). A prospective juror who has read or heard of the confession in statements repeatedly in the news may well be unable to form an independent judgment as to guilt or innocence from the evidence adduced at trial. In the present case, there may be other facts that are strongly implicative of the accused, as, for example, those associated with the circumstances of his arrest. There also may be facts that are not necessarily implicative, but that are highly prejudicial, as, for example, facts associated with the accused's criminal record, if he has one. Certain statements as to the accused's guilt by those associated with the prosecution might also be prejudicial. There is no litmus paper test available. Yet some accommodation of the conflicting interests must be reached. The governing principle is that the press, in general, is to be free and unrestrained and that the facts are presumed to be in the public domain. The accused, and the prosecution if it joins him, bears the burden of showing that publicizing particular facts will irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt. Of course, if a change of venue will not allow the selection of a jury that will have been beyond the reach of the expected publicity, that also is a factor.

4. Paragraph 6 of the restrictive order also prohibits disclosure of the "exact nature of the limitations" that it imposes on publicity. Since some of those limitations are hereby stayed, the restrictions on the reporting of those limitations are stayed to the same extent. Inasmuch as there is no point in prohibiting the reporting of a confession if it may be reported that one has been made but may not be spoken of, the provision in paragraph 6 that the re-



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striction on reporting confessions may itself not be disclosed is not stayed.

5. To the extent, if any, that the District Court's order prohibits the reporting of the pending application to the Supreme Court of Nebraska, and to the extent, if any, that the order prohibits the reporting of the facts of the filing of my chambers opinion of November 13, or of this opinion (other than those parts of the opinions that include facts properly suppressed), the restrictive order is also stayed.

6. Nothing herein affects those portions of the restrictive order governing the taking of photographs and other media activity in the Lincoln County courthouse. Neither is it to be deemed as barring what the district judge may impose by way of restriction on what the parties and officers of the court may say to any representative of the media.

The District Court and the Supreme Court of Nebraska obviously are closer than I am to the facts of the crimes, to the pressures that attend it, and to the consequences of community opinion that have arisen since the commission of the offenses. The Supreme Court, accordingly, is in a better position to evaluate the details of the restrictive order. It may well conclude that other portions of that order are also to be stayed or vacated. I have touched only upon what appear to me to be the most obvious features that require resolution immediately and without one moment's further delay.

*On Reapplication for Stay*

Dated November 20, 1975

HARRY A. BLACKMUN  
Associate Justice  
United States Supreme Court

A true copy MICHAEL RODAK, JR.

Test:

Clerk of the Supreme Court of the United States  
By FRANCIS J. CORSON

Deputy

**Per Curiam Opinion**

[December 1, 1975]

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No. 40471STATE OF NEBRASKA ex rel.  
NEBRASKA PRESS ASSOCIATION, et al.,*Relators,*

v.

THE HONORABLE HUGH STUART, Judge, District Court  
of Lincoln County, Nebraska,*Respondent.*

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No. 40445

STATE OF NEBRASKA,

*Plaintiff,*

v.

ERWIN CHARLES SIMANTS,

*Defendant.*

Heard before:

WHITE, C.J.,  
SPENCER, BOSLAUGH, McCOWN, NEWTON, CLINTON,  
and BRODKEY, JJ.

PER CURIAM.

At issue in these cases is the resolution of an apparent conflict between the guarantees of the First and Sixth Amendments to the Constitution of the United States. This court is called upon to draw an accommodation between these two "preferred" amendments which will preserve the right to a fair trial without abridging freedom of the press.

**Per Curiam Opinion**

The issue is laid before us by the relators in No. 40471, television, newspaper, and other media organizations and personnel, who seek through an original action a writ of mandamus which will compel the respondent District Court Judge for Lincoln County to vacate a restrictive order relating to the publication of pretrial publicity in the case of Nebraska v. Erwin Charles Simants, No. 40445.

On October 18, 1975, six members of a family were found dead of gunshot wounds in their home at Sutherland, Nebraska. On October 19, 1975, Erwin Simants was charged with six counts of murder in the first degree, arraigned, and counsel was appointed for him. A preliminary hearing was set for October 22, 1975. On October 21, 1975, the prosecuting attorney filed a motion for a restrictive order with the county court, requesting the court to restrict publication of testimony to be presented at the preliminary hearing. A hearing on the motion was held that same evening. Attorneys representing the State, Simants, and the media were present. Attorney for the defendant advised the court that Simants consented to the State's motion to restrict publication of testimony from the preliminary hearing and further made an oral motion requesting that the restrictive order be broadened to close the preliminary hearing to the public and press. After arguments by counsel, the court found the State's motion should be sustained.

On October 22, 1975, prior to the preliminary hearing, the county court entered a restrictive order. The order precluded all parties involved in the preliminary hearing as well as the "news media" from releasing "for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary

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hearing. The order also contained additional restrictive provisions apart from the preliminary hearing. Finally, the court denied Simants' motion requesting a closed hearing.

On October 22, 1975, the preliminary hearing was held on an amended complaint which charged murder in the first degree and further alleged that one or more of the murders were committed in the perpetration of or attempt to perpetrate one or more sexual assaults. After testimony from several witnesses and the introduction of other evidence, Simants was bound over to District Court to stand trial.

On October 23, 1975, attorneys representing the persons who are now the relators in the mandamus action filed in the case of State v. Simants in the District Court an application requesting the right to be heard on a challenge to the constitutionality of the restrictive order entered by the county court. The District Court granted petitioners' motion to intervene. On that same day, October 23, 1975, Simants made a motion for a continuation of the county court's restrictive order with respect to pretrial publicity. On October 27, 1975, the District Court acted on defendant's motion. It terminated the county court's order and imposed its own restrictions on dissemination of pretrial publicity emanating from the case. The District Court adopted, with some clarifications, the standards set out in The Nebraska Bar-Press Guidelines for Disclosing and Reporting of Information Relating to Imminent or Pending Criminal Litigation. These standards, together with the accompanying clarifications, precluded the media from reporting on most of the testimony and some other evidence presented at the preliminary hearing.

*Per Curiam Opinion*

Petitioners sought relief in this court from the October 27, 1975, restrictive order imposed by the District Court via two procedural routes. On October 31, 1975, petitioners instituted a section 29-1912, R.R.S. 1943, appeal from the District Court order and at the same time petitioned this court for leave to file an original action in the nature of a writ of mandamus requesting this court to vacate the October 27, 1975, restrictive order.

While petitioners' appeal and request to docket an original action in this court were pending, they petitioned Mr. Justice Blackmun of the United States Supreme Court, asking him as Circuit Justice to stay the October 27, 1975, District Court order under 28 U.S.C., sections 2101(f) and 1257(3). Thereafter, this court on November 10, 1975, issues a per curiam memorandum in which we noted that petitioners were seeking concurrent relief from both the United States Supreme Court and this court and we therefore declined to take action on the petition for a writ of mandamus so long as we were in the position of exercising parallel jurisdiction with the Supreme Court of the United States. We continued action on the matter until the United States Supreme Court made known whether it would accept jurisdiction in the matter.

On November 13, 1975, Mr. Justice Blackmun, in his capacity as Circuit Justice, issued a chambers opinion in which he noted his desire to restrain from issuing or denying a stay on the restrictive order until this court had an opportunity to act on the same.

On November 18, 1975, this court set November 25, 1975, as the date on which we would hear petitioners' arguments on their request for an original action as well as on the



*Per Curiam Opinion*

substantive questions surrounding the constitutionality of the restrictive order. Petitioners thereafter filed a reapplication for a stay with Mr. Justice Blackmun.

On November 20, 1975, Mr. Justice Blackmun handed down a chambers opinion in which he granted petitioners a partial stay on the October 27, 1975, order. The extent of that stay will be discussed in greater detail below.

On November 24, 1975, the Lincoln County attorney and defendant's attorney filed petitions in intervention with this court requesting to be heard at the November 25, 1975, hearing. The petitions were granted and a full hearing was held before this court on that date.

On November 25, 1975, this court, despite the intervening order of Mr. Justice Blackmun heard oral arguments in both cases before us insofar as they pertain to the request for a stay of the restrictive order of the District Court. After Mr. Justice Blackmun issued his order the media not being satisfied therewith invoked the jurisdiction of the Supreme Court of the United States and asked it to vacate the portion of the trial court's restrictive order not vacated by Mr. Justice Blackmun. If we were to be entirely consistent we ought now to again refrain from acting because we are now in the position of exercising concurrent jurisdiction with the United States Supreme Court for which there is no precedent. Nonetheless, despite the regrettable possibility of collision, there are important questions of procedure and standing which need definition by us and which relate only to state procedures. In addition, the trial courts of this state are in need of some guidance from us in the matter at issue and which may not be otherwise forthcoming. Additionally, as Mr. Justice Blackmun appropriately notes, the question of the jurisdiction of the Supreme

*Per Curiam Opinion*

Court of the United States in this matter is "not without difficulty" because there has been no order, final or otherwise, by this court. That "difficulty" ought to be removed. So we proceed to determine the matter before us on the merits insofar as the request for the stay of the lower court order is concerned.

The first question we must decide is of that of our own jurisdiction in No. 40471, the original action of mandamus. We have jurisdiction in an original action of mandamus if the order of Judge Stuart of October 27, 1975, is in whole or in some significant part wholly void. *State ex rel. Reynolds v. Graves*, 66 Neb. 17. We conclude, for reasons hereinafter stated, that the order is in part void and so affirm or grant a permission to the relators to file the original action.

The next question before us is whether the relators had standing to intervene in the case of *State v. Simants*, No. 40445. No third party has any right to intervene in a criminal prosecution. The matter at issue in such cases is the guilt or innocence of the accused. In legal contemplation no third party "has or can claim an interest in the matter in litigation, in the success of either of the parties to [the] action, or against both." This is the standard applicable to the right to intervene. § 25-328, R.R.S. 1943. See *State v. Berry*, 192 Neb. 826. Accordingly, the appeal in No. 40445 is dismissed.

The restrictive order of Judge Stuart of October 27, 1975, insofar as we need to set it forth is in summary as follows: It applies only to pretrial publicity and terminates when the jury is empaneled to try the case of *State v. Simants*. It applies only to the relators. It incorporates generally as a standard for reporting certain voluntary Nebraska Bar-Press Guidelines for Disclosing and Report-

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ing of Information Relating to Imminent or Pending Criminal Litigation. It prohibits the publication of the fact, if any, or the contents of confessions or admissions against interest or statements, made by the accused to law enforcement officials. It prohibits the publication of the fact, if any, or the contents of statements against interests made to certain named individuals. It prohibits the publication of the nature of the probable testimony of certain named witnesses, and certain aspects of the testimony of another named witness. It prohibits the publication of the identity of a person or persons allegedly sexually assaulted. It prohibits the publication of the exact nature of the limiting order and prohibits reference to the contents of two specific paragraphs of the order.

We now proceed to our resolution and accommodation of the two conflicting constitutional rights and introduce that resolution by quotations from a statement on matters of joint concern to the bench, the bar, law enforcement officers, and the news media contained in the Standards Relating to Criminal Justice, A.B.A. "(a) *General*. Freedom of speech and of the press are fundamental liberties guaranteed by the United States Constitution. They must be zealously preserved, but at the same time must be exercised with an awareness of the potential impact of public statements on other fundamental rights, including the right of a person accused of crime, and of his accusers, to a fair trial by an impartial jury.

"(b) *The need to inform the public*. It is important both to the community and to the criminal process that the public be informed of the commission of crime, that corruption and misconduct, including the improper failure to arraign or to prosecute, be exposed whenever they are found, and

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that those accused of crime be apprehended. If, however, public statements and reporting with respect to these matters assume the truth of what may be only a belief or a suspicion, they may destroy the reputation of one who is innocent and may seriously endanger the right to a fair trial in the event that formal charges are filed.

"(c) *From the time of arrest or the filing of charges to the beginning of trial*. A man who has been arrested, for whom an arrest warrant has been issued, or against whom a criminal complaint, information, or indictment has been filed, has only been charged with the commission of crime. He is entitled under the Constitution to a fair and impartial trial, in which he is presumed innocent until proved guilty by competent evidence. Thus during the period prior to trial, public statements originating from officials, attorneys, or the news media that assume the guilt of the person charged, that include inaccurate or inadmissible information, or that serve to inflame the community, may undermine the judicial process by making unobtainable a jury satisfying the requisite standard of impartiality. Alleged facts may be untrue, confessions obtained or evidence seized may be inadmissible in evidence, prior criminal records will be inadmissible except under limited circumstances and for restricted purposes, and witnesses may substantially modify their stories under oath or after confrontation by the accused on cross-examination. The right to a fair trial may thus be substantially endangered by public statements or by reporting prior to trial going beyond a factual description of the person arrested and of the crime charged and a factual statement of the arrest and surrounding circumstances. The danger is especially acute when public statements or reporting extend to such



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matters as confessions or admissions, prior history, or the performing of tests or refusal to submit to a test; opinions about guilt or innocence; interviews of prospective witnesses; interviews of the defendant before he has had an opportunity to consult with counsel; and speculation as to the plea to be entered or the evidence or testimony to be introduced at the trial. The release and publication of photographs when identification is a matter in dispute may cause particular difficulty, as may reiteration of any earlier detailed reports as the time of trial approaches."

The constitutional guarantees of freedom of speech and of the press and of the right of trial by an impartial jury are, in our judgment, the same under both the Constitution of this state and of the United States and there is no need to differentiate between the two Constitutions in this discussion.

"The First Amendment freedoms are not ends in themselves, but only means to the end of a free society. . . . The First Amendment freedoms are vital, but their exercise must be compatible with the preservation of other essential rights. Application of the First Amendment can no more be governed by absolute rules than can that of other constitutional provisions." Schwartz, *Constitutional Law*, p. 251. The rights which are guaranteed by the First Amendment to the United States Constitution and the right to trial by an impartial jury guaranteed by the Sixth Amendment are both "preferred" rights. Schwartz, *op sit*, p. 193. The Constitution makes no hierarchy of rights. Jackson, J., dissenting, *Brinegar v. United States*, 337 U.S. 610, 180 (1949).

The Supreme Court of the United States has not yet had occasion to speak definitively where a clash between these two preferred rights was sought to be accommodated by

*Per Curiam Opinion*

a prior restraint on freedom of the press. There are, however, some statements in various opinions which lead to the conclusion that under some circumstances prior restraint may be appropriate. In *Branzburg v. Hayes*, 408 U.S. 665 (1972) where the claimed right of a newsman not to be compelled to testify before a grand jury was denied, Mr. Justice White, in the majority opinion said: "The prevailing view is that the press is not free with impunity to publish everything and anything it desires to publish. . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), for example, the Court reversed a state court conviction where the trial court failed to adopt 'stricter rules governing the use of the courtroom by newsmen as Sheppard's counsel requested,' neglected to insulate witnesses from the press, and made no 'effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides.' *Id.*, at 358, 359. '[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters.' *Id.*, at 361." The statement immediately preceding the citation of *Sheppard v. Maxwell* is, however, dicta as no issue of prior restraint was actually involved in the *Sheppard* case. There are implications in some opinions that prior



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restraints may be imposed and it is also clear that the Supreme Court of the United States has never said, in the context with which we are here concerned, that such restraints may never be imposed when necessary to assure trial by an impartial jury. See *Irvin v. Dowd*, 366 U.S. 717; Frankfurter, J., concurring, p. 729. In *Pennecamp v. United States*, 328 U.S. 331, Mr. Justice Reed said: "Free discussion of the problems of society is a cardinal principle of Americanism — a principle which all are zealous to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct. It does not follow that public comment of every character upon *pending trials* or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in the light of the effect on himself and on the public of creating a clear and present danger to the fair and orderly judicial administration. Courts must have the power to protect the interests of prisoners and litigants before them from unseemly efforts to prevent judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." (Emphasis supplied.) In *New York Times v. United States*, 403 U.S. 713, it is said in a case not involving personal conflicting constitutional rights that a prior restraint on the media bears "a heavy presumption against its constitutional validity." This same statement has been made

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by the Supreme Court of the United States in other cases. The implication of such statement is that if there is only a presumption of unconstitutionality then there must be some circumstances under which prior restraints may be constitutional for otherwise there is no need for a mere presumption.

None of the cases in which the United States Supreme Court has used language which imports an absolutist view of the First Amendment free speech right involves a conflict between two fundamental or preferred constitutional rights. In *Bridges v. State of California*, 314 U.S. 252, Justice Black noted the difficulty of resolving conflicts between the rights of free speech and fair trial and said: "[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." (p. 260) In *Cox Broadcasting Corp. v. Martin Cohn*, 43 L. Ed. 2d 328, the conflict was between freedom of the press and a claimed right of personal privacy which was, under the circumstance, clearly not a constitutional right. See, also, *Craig v. Harney*, 331 U.S. 367 (misconduct); *Near v. Minnesota*, 283 U.S. 697 (misconduct).

It is, of course, absolutely clear that the purpose of freedom of the press is not to determine the outcome of litigation by newspaper publicity, although unfortunately on some occasions it has been so used. *Sheppard v. Maxwell*, *supra*; *State v. Lovell*, 117 Neb. 710; *Irvin v. Dowd*, *supra*; *Rideau v. Louisiana*, 373 U.S. 723.

The relators take an absolutist position as far as freedom of the press is concerned and state that even if in some cases because of the exercise of freedom of the press pretrial publicity was such that trial by an impartial jury became impossible it is better that an accused go free than

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that freedom of the press be impinged even in the slightest degree. They say, "Petitioners would initially point out that the irreparable injury in such a situation is not that defendant will be incarcerated on the basis of an unfair trial; *the injury . . . is to society as a whole, which, due to the impossibility of a defendants obtaining a fair trial, must necessarily forego a conviction of a person who may well have committed the crime for which he is charged.*" (Emphasis supplied.)

In the preface of its restrictive order the District Court found "there is a clear and present danger that pretrial publicity would impinge upon the defendant's right" to be tried by an impartial jury, that is, as we see it, by 12 persons who have not already made up their minds as to the defendant's guilt or innocence. It is, of course, the constitutional right of a defendant to rely upon the presumption of innocence which the law gives and to require the State to prove that he (1) committed the act charged and (2) his legal culpability, if that is also an issue.

We have earlier referred to the principle that orders imposing prior restraint bear a heavy presumption of unconstitutionality. Does the evidence in the court below support the court's finding so as to overcome the heavy presumption of unconstitutionality of the prior restraint? The trial court in the preface to its restrictive order found that there is a clear and present danger that pretrial publicity could substantially impair the right of the defendant to a trial by an impartial jury unless restraints were imposed. Does that evidence rather clearly indicate that the obligation of this state under the Constitutions of the United States and of this state to afford the accused a trial by an impartial jury may be impaired by pretrial publicity? The relators argue that there is no

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evidence to support the finding because there was no hearing at which they were represented and because no evidence was actually received by the county court at its hearing. Both assertions are true, but it is not the order of the county court which is under attack here.

We are confronted with two separate questions. The first is the question of the jurisdiction of the court over the persons of the relators. The second is the sufficiency of the evidence to support the necessity of an order imposing some prior restraints, assuming that prior restraint in any degree is constitutional. We first deal with the question of jurisdiction.

The relators, by their motion to intervene in *State v. Simants* invoked and submitted themselves to the jurisdiction of the District Court. Their motion was granted (erroneously, as we have previously indicated), nonetheless, at that time the District Court acquired jurisdiction over the persons of the relators. They were heard and evidence was received. The District Court then temporarily adopted as its own the previous order of the county court and later adopted its own modified order. It is that order that is before us for examination. Relators point out, quite properly we believe, that "a judgment entered without jurisdiction of the person or the subject matter or in excess of the court's power is void and may be collaterally impeached." *Woods v. Goodson*, 485 S.W. 2d 213. It seems clear enough that the county court had no jurisdiction over the persons of the relators. The order of the county court was void for lack of jurisdiction of the person. That order purports to restrain "the news media." The courts have no general power in any kind of case to enjoin or restrain "everybody". Even when acting with jurisdiction in proper cases orders must pertain to par-



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ticular persons or legal entities over whom the court has in some manner acquired jurisdiction.

The relators could have ignored the order, or, if they wished to avoid the possibility of some effort by the court to start contempt proceedings, collaterally attacked the order in some manner as by mandamus or action for a declaratory judgment. Admittedly these latter courses would have been somewhat time consuming. Perhaps for that reason the relators sought to intervene directly in *State v. Simants*, which they did in the District Court. Their request was granted by the court. Their appearance was not special, but general. These relators voluntarily submitted to the jurisdiction of the court and asked not only that the order be lifted, but also opposed the request of the defendant that certain pretrial proceedings be closed to the general public.

We now turn to the circumstances under which the District Court entered its restrictive order. The evidence in the hearing before the District Judge consisted principally of the testimony of the county judge who had entered the prior order and copies of numerous news articles from newspapers printed or circulated in the county where the crime occurred. The record demonstrates clearly that even before the defendant was afforded a preliminary hearing which the statutes of this state, namely section 29-1607, R.S. Supp., 1974, and probably the Constitution of the United States, requires (see *Gerstein v. Pugh*, 420 U.S. 103), certain of the newspapers had printed articles which contained hearing information, of purported statements of the counsel, which, if true, tended clearly to connect the accused with the slayings and which information, if true, was likely to be, or at least some of it, presented at the preliminary hearing. The items to which we refer

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were printed within articles of the October 20, 1975, issue of the North Platte Telegraph; the October 20, 1975, issue of the Lincoln Star; the October 21, 1975, issue of the Denver Post. This information, if obtained from official sources, would not under the provisions of item 1 of the guidelines under the heading "Information Generally Not Appropriate for Disclosure and Reporting" be appropriate for reporting. The record shows that this was recognized by some of the media, but doubt was expressed that the voluntary guidelines would apply to a preliminary hearing. The District Court, therefore, could quite properly conclude that their evidence from the preliminary hearing, if it was in fact presented would have again been repeated by at least some of the relators. Those conclusions are reinforced by the fact that in open court at the hearing before the District Judge, counsel for the media stated that it is already doubtful that an unbiased jury can be found to hear the *Simants* case in Lincoln County. This statement of counsel was later reported in the October 23, 1975, issue of the North Platte Telegraph.

The concern of the prosecutor, the defense attorney, and the county judge that pretrial publicity might make it difficult or impossible for the State of Nebraska to afford *Simants* a trial before an impartial jury was not ill founded. Unless the absolutist position of the relators was constitutionally correct, it would appear that the District Court acted properly in restraining publication of certain information which might or may have been adduced at the preliminary hearing.

Section 29-1301, R.S. Supp., 1975, provides: "All criminal cases shall be tried in the county where the offense was committed, except as otherwise provided in sections 29-1301.01 to 29-1301.03 or section 240903, or unless it shall



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appear to the court by affidavits that a fair and impartial trial cannot be had therein. In such a case the court may direct the person accused to be tried in some adjoining county." The laws of this state also provide that an accused must be tried within 6 months within the date of the filing of the information or be absolutely discharged. § 29-3205, et seq., R.R.S. 1943; *State v. Alvarez*, 189 Neb. 281. Trial of the accused has now been set for January 5, 1976.

There are other factors which the District Court could properly take into consideration. The population of Lincoln County, Nebraska, according to the 1970 census was 29,538. The populations, according to the same census of the adjacent counties to which venue might be changed are as follows:

| <i>County</i> | <i>1970 Population</i> |
|---------------|------------------------|
| Keith         | 8,487                  |
| Perkins       | 3,423                  |
| Hayes         | 1,530                  |
| Frontier      | 3,982                  |
| Dawson        | 19,537                 |
| Custer        | 14,092                 |
| Logan         | 991                    |
| McPherson     | 623                    |

The area in which the jury may be selected is served by several radio stations, two television stations, and several newspapers in addition to those specifically mentioned. Modern communications tend toward the saturation point in news coverage and so as a practical matter in some cases it is much more difficult to obtain an impartial jury than it once was. This is evidenced by the reported cases,

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*Sheppard v. Maxwell*, *supra*; *Irvin v. Dowd*, *supra*; *Rideau v. Louisiana*, *supra*. The mere heinousness or enormity of a crime is, of course, by itself, no reason at all for a prior restraint of freedom of the press, but certainly it is a matter which a court may take into consideration along with all the other factors involved. One of these factors is, of course, the trial court's own knowledge of the surrounding circumstances.

We now turn to a discussion of the merits of the basic issue. That the press be absolutely free to report corruption and wrongdoing, actual or apparent, or incompetence of public officials of whatever branch of government is vastly important to the future of our state and nation cannot be denied as anyone who is familiar with recent events must be well aware. Prior restraint of the press, however slight, in such instances is unthinkable. *Near v. Minnesota*, *supra*. In these instances and many others no preferred constitutional rights collide.

In cases where equally important constitutional rights may collide then it would seem that under some circumstances, rare though they will be, that an accommodation of some sort must be reached. It is difficult to accept the relators' position that press in such cases must be completely unrestrained even if the cost is that a criminal cannot be tried. It is also difficult to accept the proposition that an accused may not be irreparably harmed by wrongful incarceration. *Sheppard v. Maxwell*, *supra*, is a case in point. Defendant's guilt was doubtful. Defendant's conviction was accomplished, as the opinion of the Supreme Court of the United States indicates, almost wholly because of a concededly outrageous exercise of freedom of the press. The defendant served 10 years of his sentence until his conviction was overturned and a new trial granted.

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The subsequent finding of not guilty can scarcely be said to have made the injuries suffered by the incarceration reparable. This comment, of course, is not to suggest that the reporting in this case was or is even likely to be anything like that referred to in *Sheppard v. Maxwell, supra*. The press, in fact, appears to have followed the voluntary guidelines to which they apparently were parties.

It is not, however, the accused alone who has a large stake in the constitutional right of trial by an "impartial jury." Society as a whole has just as great a stake. This is true not only because each member of the public might some day need to exercise his own right of trial by jury, but because the United States and each state of the union have the obligation under the Constitution to assure every accused of a trial by an impartial jury.

The extremist and absolutist position of the relators assumes too much. Society as a whole loses a great deal when a criminal has to go free because he cannot be tried. The same thing is true in the case where an innocent person may be convicted because an impartial jury cannot be obtained. In such cases the true criminal has gone free.

In cases where such things as this are likely to occur the constitutional right of a free press comes into direct conflict with the obligation of the state under the United States and state Constitutions to assure an accused of a trial by an impartial jury. First Amendment rights other than freedom of the press and of speech are not absolute. Freedom of religion is one of the First Amendment rights. Yet religious belief cannot be pleaded as justification for criminal action. *Davis v. Beason*, 133 U.S. 333. The constitutional guarantee does not permit the practice of polygamy on the basis of religious belief. *Reynolds v. United States*, 98 U.S. 145.

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The absolutist position assumes that each and every exercise of freedom of the press is equally important and significant and that any impingement whatever may be equally disastrous for our state and nation. Such a position cannot, we believe, be demonstrated. *Near v. Minnesota, supra*; and *Sheppard v. Maxwell, supra*, are examples of the wide disparity of importance. The absolutist position assumes there can be no degree of values for the particular right in which the absolutist has a special interest. It assumes that all other constitutional rights are somehow inferior and that impingement upon his right will ultimately lead to tyranny. The fact that our awareness of recent political history makes us extremely conscious of our great debt to a free press ought not to lead us to disparage other equally cherished personal rights, merely because, in this case, the right, trial by an impartial jury, need not be exercised by all persons. Nor should it lead us to disregard the stake all have in the exercise of that right by those who choose to or must exercise it.

We are cognizant of the possibility that this very court may be called upon in the near future to judge the fairness of the Simants' trial. We ought not to take action here which will in any measure jeopardize that ultimate fairness or put this court in the position of making prejudgments.

We conclude that the order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon freedom of the press. The guidelines were not intended to be contractual and cannot be enforced as if they were.



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The order of the District Court of October 27, 1975, is vacated and is modified and reinstated in the following respects: It shall be effective only as to events which have occurred prior to the release of this opinion, and only as it applies to the relators herein, and only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interests made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings.

One other aspect of this case requires our attention. Counsel for Simants asked the court below to close to the public, including the press, such of the pretrial proceedings as might be necessary to insure the empaneling of an impartial jury. This request the District Court denied in toto. Relators point out that section 29-311, R.R.S. 1943, provides that all judicial proceedings shall be open. State and Simants respond that the statute, if construed to apply to all pretrial proceedings irrespective of how disclosures during such proceedings might affect Simants' right to be tried by an impartial jury and affect the duty of the State to assure such impartial jury, then it is unconstitutional. We have a duty to construe statutes to make them constitutional if possible. A.B.A. Standard 3.1, Fair Trial and Free Press, in our judgment supplies an applicable standard for such construction. We, therefore, remand No. 40471 to the District Court with directions to consider any applications the State or the accused may make for closed pretrial proceedings in future instances in

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accord with the following standard which we adopt. A.B.A. Standard 3.1, Fair Trial and Free Press: "Pretrial hearings.

"Motion to exclude public from all or part of pretrial hearing.

"In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public, including representatives of the news media, on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is herefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is not substantial likelihood of such interference. With the consent of the defendant, the presiding officer may take such action on his own motion or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial. Nothing in this rule is intended to interfere with the power of the presiding officer in any pretrial hearing to caution those present that dissemination of certain information by any means of public communication may jeopardize the right to a fair trial by an impartial jury."

No. 40445. APPEAL DISMISSED.

No. 40471. REMANDED.



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No. 40471

STATE EX REL. NEBRASKA PRESS ASSOCIATION

v.

THE HONORABLE HUGH STUART

No. 40445

STATE V. SIMANTS,

CLINTON, J., dissenting.

After the issuance of the order of stay by Justice Blackmun as Circuit Judge, and since this matter was set for hearing in this court, the relators, we are reliably informed, have invoked the jurisdiction of the Supreme Court of the United States in an application to that court for full court action to overturn the portion of the order of the District Court for Lincoln County, Nebraska, sustained by the order of Mr. Justice Blackmun.

There is no precedent or authority for this court and the Supreme Court of the United States to exercise concurrent jurisdiction in matters relating to construction of the federal Constitution. Either we have jurisdiction in this case, or the Supreme Court of the United States has jurisdiction.

We have supervisory jurisdiction over the trial courts of this state. *State ex rel. Reynolds v. Graves*, 66 Neb. 17. We know of no precedent and none has been cited to us which gives to the United States Supreme Court the same supervisory jurisdiction over the trial courts of this state.

The jurisdiction of Mr. Justice Blackmun, as Circuit Judge, and the jurisdiction of the Supreme Court of the that it clearly has over the federal courts.

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United States, as Mr. Justice Blackmun recognizes in his opinion, rest upon the provisions of section 1257(3), 28 U.S.C., under which "Final judgments or decrees rendered by the highest court of a State in which a decision could be had" may be reviewed "where any title, right, privilege or immunity . . . is claimed under the Constitution . . . of the United States." Mr. Justice Blackmun concluded that a final order had been made because our failure to announce a decision exceeded "tolerable limits."

We again point out as we did in the order which set this matter for hearing, that the application of the relators was filed in this court late on Friday, October 31, 1975. As far as the writer of this opinion is aware, the application did not come to the attention of any member of this court until Monday, November 3, 1975, at which time we were engaged in the first of 6 days of oral argument in cases pending before us and already irrevocably scheduled.

This is a collegial court and no member of this court has any constitutional or statutory power to grant a stay of the type here requested. That power must be exercised by the court as a whole. Neither may we act upon the basis of telephone calls from counsel, or telegrams. Where factual matters must be reviewed, we must have before us a bill of exceptions containing the evidence expected to be reviewed.

Although an application to file an original action would not normally be considered until we sat at a regularly scheduled weekly consultation, nonetheless, in this particular case the matter was, in accord with our standing practice, assigned to one of the judges of this court on November 4, 1975, for the purpose of preparing a report and recommendation to be considered by the full court at special consultation on Monday, November 10, 1975.

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While that report was in the process of preparation, the relators on November 4 or 5, 1975, had filed with Mr. Justice Blackmun in Washington, D.C., the application for a stay. This intervening and to us unanticipated occurrence affected the content of the report and resulted in the per curiam order of continuance adopted by us on November 10, 1975.

On November 13, 1975, Mr. Justice Blackmun rendered his first opinion on his expectation that we would "act forthwith and without delay." On November 13, 1975, there was filed by the relators the bill of exceptions in No. 40445 and for the first time we had before us something other than ex parte representations as to what had occurred in the trial court. On November 17, 1975, we entered an order permitting the filing of the original action and set for hearing on November 25, 1975, the application for stay both in the original action and the direct appeal and give notice to all parties of the hearing.

Apparently both the relators and Mr. Justice Blackmun expected that we would act summarily without notice to all interested parties and without a hearing. We did not do so, we think for reasons that should be obvious.

Despite the fact that Mr. Justice Blackmun acted on November 20, 1975, we nonetheless held the hearing on November 25, 1975. All parties were heard. However, between November 20, 1975, and November 25, 1975, as we have already mentioned, the relators invoked the jurisdiction of the Supreme Court of the United States to overturn Mr. Justice Blackmun's stay. We believe the relators are estopped to claim that we still have jurisdiction.

Mr. Justice Blackmun indicated that the problem of the jurisdiction of the United States Supreme Court under section 1257, 28 U.S.C., is "not from difficulty." We ought

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now to remove that difficulty. The circular state of affairs which has existed ought to come to an end.

The appeal of the relators in No. 40445 should be dismissed on the grounds they have no standing to intervene in a criminal prosecution. § 25-328, R.R.S. 1943; *State v. Berry*, 192 Neb. 826.

The original action of the relators, No. 40471, ought to be dismissed as improvidently granted because of the intervening jurisdiction in the Supreme Court of the United States.

WHITE, C.J., joins in this dissent.

SPENCER, J., Concurring.

This case requires immediate resolution in this court. While I am in full agreement with the merits of the dissent, I join in the majority opinion to resolve the immediate controversy in this jurisdiction.

Newton, J., joins in this concurrence.

### Orders of December 8, 1975

A-426 NEBRASKA PRESS ASSOCIATION et al v. HUGH STUART,  
JUDGE, DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

On November 21, 1975 the petitioners filed a motion with the full Court to vacate in part Mr. Justice Blackmun's stay order filed herein on November 20, 1975. Inasmuch as the order of November 20 was directed solely to the order dated October 27, 1975 of the District Court of Lincoln County, Nebraska and by its terms was subject to such action as might subsequently be taken by the Supreme Court of Nebraska, and inasmuch as the Supreme Court of Nebraska on December 1 issued its order in the matter and Mr. Justice Blackmun's order has thereby expired and is no longer effective, the petitioners' motion is denied. Denial of this application is without prejudice to the Court's consideration of the petitioners' further application for stays and for other relief filed with this Court on December 4, 1975 and presently pending.

A-513 NEBRASKA PRESS ASSOCIATION et al. v. HUGH STUART,  
JUDGE, DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

The motion to treat the previously filed papers as a petition for a writ of certiorari to the Supreme Court of Nebraska is granted; consideration of said petition for a writ of certiorari is deferred until requested responses thereto have been received or until the close of business Tuesday, December 9, 1975. Consideration of the application for stay of the judgment of the Supreme Court of Nebraska, entered December 1, 1975, is deferred pending further order of the Court. Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Marshall would grant the application.

### Order of December 12, 1975

No. 75-817 NEBRASKA PRESS ASSOCIATION, et al. v. STUART

The motion of Nebraska Press Association, et al., for leave to treat their application as a petition for certiorari having been heretofore granted, it is ordered:

1. The petition for certiorari is granted;
2. The motion to expedite is denied.  
Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall would grant the motion.
3. The application for a stay is denied.  
Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall would grant the application.  
Mr. Justice White would stay the judgment of the Nebraska Supreme Court to the extent that its order forbade the publication of information disclosed in public at the preliminary hearing in the criminal case out of which this case arose. In this respect, he is in disagreement with the Court's actions in this case today. He joins the Court in granting the petition for a writ of certiorari and in ordering plenary consideration of this case, which as he understands it raises issues broader than the power of the State to enjoin the publication of facts disclosed at a public hearing in a state court. Being convinced that these questions should be decided only after adequate briefing and argument and ample time for mature consideration, he is in agreement that we should not attempt to hear and decide this case prior to the beginning of the criminal trial in early January.



*Order of December 12, 1975*

4. Petitioners Nebraska Press Association, et al., are invited to file an amended petition for certiorari on or before December 30, 1975. Responses may be made in accord with the Court's Rules.

Supreme Court, U. S.

FILED

JAN 26 1976

MICHAEL ROBAR, JR., CLERK

**JOINT APPENDIX**

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM 1975

—  
**No. 75-817**  
—

NEBRASKA PRESS ASSOCIATION, et al.,  
*Petitioners,*

v.

THE HONORABLE HUGH STUART, JUDGE, DISTRICT COURT IN  
AND FOR LINCOLN COUNTY, NEBRASKA, et al.,  
*Respondents.*

—  
**On Writ of Certiorari to the Supreme Court of Nebraska**  
—

—  
**Motion to Treat Previously Filed Papers**

**Petition for a Writ of Certiorari Granted December 8, 1975**

**Certiorari Granted December 12, 1975**

**Amended Petition for a Writ of Certiorari Filed December 24, 1975**

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**Relevant Docket Entries and Proceedings**

**DATE—PROCEEDINGS**

**1975**

October 19—Complaint filed in *State of Nebraska v. Simants*

October 19—Simants arraigned; Co. Court sustain County Attorney's notice to close part of arraignment hearing over Simants' objection; County Court order preliminary hearing to be held October 22, 1975.

October 21—Co. Court grants County Attorney's motion for restrictive order, overrules Simants' motion to close preliminary hearing to public.

October 22—Co. Court enters restriction order and order Simants bound over for trial to the District Court after Preliminary Hearing.

October 27—Dist. Ct. terminates County Court order of October 22 and enters new restrictive order after hearing.

October 31—Petitioners file notice of appeal in Dist. Ct.

October 31—Petitioners file application for leave to docket an original action, No. 40471 in the Supreme Court of Nebraska.

November 4—Transcript on appeal filed in Supreme Court of Neb., No. 40445, with motion to advance appeal.

November 5—Petitioners file application for stay with Mr. Justice Blackmun, No. A-426.

November 10—Neb. Sup. Ct. enters per curiam order declining to act.

November 13—Mr. Justice Blackmun enters order neither granting nor denying stay in No. A-426.

November 18—Neb. Sup. Ct. enters order for hearing and order to show cause in No. 40471 and No. 40445, granting petitioners leave to file an original action.

November 20—Mr. Justice Blackmun enters order granting in part and denying in part stay application in No. A-426.

November 24—County Attorney and Simants file petition in intervention in Neb. Sup. Ct.

November 25—Hearing held before Neb. Sup. Ct.

December 1—Neb. Sup. Ct. issues order and opinion in No. 40445 and No. 40471, and grants State of Nebraska and Erwin Simants leave to intervene in No. 40471.

### OPINIONS AND ORDERS OF THE COURTS BELOW

The opinions of the County Court of Lincoln County, Nebraska, dated October 22, 1975, and the District Court of Lincoln County, Nebraska, dated October 27, 1975, are set forth at pages 1a and 9a of the Appendix to the Amended Petition for a Writ of Certiorari (hereinafter "Cert. A"). The *per curiam* statement of the Nebraska Supreme Court issued on November 10, 1975, is set forth at Cert A 19a. The opinion of Mr. Justice Blackmun dated November 13, 1975, is set forth at Cert A 21a. The Order of the Nebraska Supreme Court for Hearing and Order to Show Cause entered on November 18, 1975, is set forth at Cert A 29a. The opinion of Mr. Justice Blackmun dated November 20, 1975, is set forth at Cert A 35a. The majority, concurring and dissenting opinions of the Nebraska Supreme Court dated December 1, 1975, are set forth at Cert A 44a and are reported at 63 Neb. S.C.J. 783, — N.W.2d —. The Orders of this Court, dated December 8, 1975, and December 12, 1975, which, *inter alia*, granted the motion for petitioners to treat papers previously filed by them with this Court as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska and granted said Petition are set forth at Cert A 70a and 71a. Except as indicated above, none of said opinions is thus far reported.

## SUPREME COURT OF NEBRASKA

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 No. 40471
 

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STATE OF NEBRASKA, ex rel. NEBRASKA PRESS  
ASSOCIATION et al.

v.

STUART

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 EXCERPTS FROM TRANSCRIPT
 

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## Exhibit A1

Filed Oct. 14, 1975—Ronald A. Ruff, County Judge  
 Filed Oct. 29, 1975—I. L. Boyle, Clerk District Court

IN THE COUNTY COURT OF LINCOLN COUNTY, NEBRASKA

COMPLAINT  
(28-401)THE STATE OF NEBRASKA, *Plaintiff*

vs.

ERWIN CHARLES SIMANTS, *Defendant*STATE OF NEBRASKA,  
COUNTY OF LINCOLN

Milton R. Larson, County Attorney of Lincoln County,  
 Nebraska, for and in the name of the State of Nebraska,  
 complains before a County Judge of Lincoln County,  
 Nebraska that

ERWIN CHARLES SIMANTS

Defendant, on or about October 18, 1975, then in Lincoln  
 County, Nebraska, did unlawfully,

## COUNT I

purposely and of deliberate and premeditated malice, kill  
 another, to wit: Henry Kellie; and

## COUNT II

Milton R. Larson being further duly sworn, complains  
 that Erwin Charles Simants, defendant, on or about Oc-  
 tober 18, 1975, then in Lincoln County, Nebraska, did un-  
 lawfully, purposely and of deliberate and premeditated  
 malice, kill another, to wit: Audrey Marie Kellie; and

## COUNT III

Milton R. Larson being further duly sworn, complains  
 that Erwin Charles Simants, defendant, on or about Oc-  
 tober 18, 1975, then in Lincoln County, Nebraska, did un-  
 lawfully, purposely and of deliberate and premeditated  
 malice, kill another, to wit: David Kellie; and

## COUNT IV

Milton R. Larson being further duly sworn, complains  
 that Erwin Charles Simants, defendant, on or about Oc-  
 tober 18, 1975, then in Lincoln County, Nebraska, did un-  
 lawfully, purposely and of deliberate and premeditated  
 malice, kill another, to wit: Daniel Kellie; and

## COUNT V

Milton R. Larson being further duly sworn, complains  
 that Erwin Charles Simants, defendant, on or about Oc-  
 tober 18, 1975, then in Lincoln County, Nebraska, did un-  
 lawfully, purposely and of deliberate and premeditated  
 malice, kill another, to wit: Deanne Kellie; and



## COUNT VI

Milton R. Larson being further duly sworn, complains that Erwin Charles Simants, defendant, on or about October 18, 1975, then in Lincoln County, Nebraska, did unlawfully, purposely and of deliberate and premeditated malice, kill another, to wit: Florence Kellie;

contrary to the statutes of the State of Nebraska.

/s/ MILTON R. LARSON  
County Attorney

SUBSCRIBED and sworn to before me on October 19, 1975.

/s/ RONALD A. RUFF  
County Judge

[SEAL]

Filed Oct. 29, 1975—Ronald A. Ruff, County Judge

IN THE COUNTY COURT IN AND FOR LINCOLN COUNTY, NEBRASKA

Case No. 75-789

THE STATE OF NEBRASKA, *Plaintiff*

vs.

ERWIN CHARLES SIMANTS, *Defendant*

## JOURNAL ENTRY

Now ON THIS 19th day of October, 1975, this matter came on for arraignment. The defendant was present in Court in the custody of the Sheriff of Lincoln County, Nebraska. The State of Nebraska was represented by Milton R. Larson, County Attorney, and Marvin L. Holscher, Chief Deputy County Attorney. The Honorable Ronald A. Ruff presided.

The Court identified the persons present and advised the defendant of the nature of the proceedings. The complaint was read to the defendant. The Court read Section 28-401, 1975 Supp. to the defendant. The defendant was thereupon advised of his constitutional rights. The defendant advised the Court that he desired an attorney to represent him but that he did not have funds to employ his own attorney. The Court thereupon appointed Keith Bystrom, Public Defender, and Leonard P. Vyhnaelek, Assistant Public Defender, who were present in Court at the time, to represent the defendant.

The County Attorney requested that bail not be set. The County Attorney also advised the Court that since proof concerning bail would be required under Section 9 of Article 1, of the Constitution of the State of Nebraska and that such proof would be prejudicial to the rights of the defendant to later obtain a fair trial, that the Hearing on bail should be closed. The defendant objected. The Court sustained the Motion and directed that all spectators in the Court remove themselves from the Courtroom. The State then advised the Court what the evidence would show, if the witnesses were called to testify. Immediately thereafter, the spectators were permitted to return to open Court. Thereupon the Court being duly advised in the premises found that a Preliminary Hearing on the complaint filed herein, should be held on October 22, 1975, commencing at the hour of 9:00 a.m., and that bail should be denied.

IT IS THEREFORE ORDERED that a Preliminary Hearing be held upon the complaint filed herein October 22, 1975, commencing at 9:00 a.m.

IT IS FURTHER ORDERED that bail be denied.

BY THE COURT  
/s/ RONALD A. RUFF  
County Judge

[SEAL]

**Exhibit B**

Filed Oct. 21, 1975—Ronald A. Ruff, County Judge

IN THE COUNTY COURT OF LINCOLN COUNTY, NEBRASKA

Case No. 75-789

**THE STATE OF NEBRASKA, Plaintiff**

vs.

**ERWIN CHARLES SIMANTS, Defendant****MOTION FOR RESTRICTIVE ORDER**

The State of Nebraska hereby represents unto the Court that by reason of the nature of the above-captioned case, there has been, and no doubt there will continue to be, mass coverage by news media not only locally but nationally as well; that a preliminary hearing on the charges has been set to commence at 9:00 a.m. on October 22, 1975; and there is a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial should the defendant be bound over to trial in the District Court if testimony of witnesses at the preliminary hearing is reported to the public.

WHEREFORE the State of Nebraska moves that the Court forthwith enter a Restrictive Order setting forth the matters that may or may not be publicly reported or disclosed to the public with reference to said case or with reference to the preliminary hearing thereon, and to whom said order shall apply.

DATED this 21st day of October, 1975.

THE STATE OF NEBRASKA,

By /s/ MILTON R. LARSON  
Milton R. Larson  
County Attorney

I hereby certify that on this 21st day of October, 1975, I delivered a copy of the foregoing Motion to the attorneys for the defendant.

/s/ MILTON R. LARSON

IT IS THEREFORE ORDERED that a Preliminary Hearing be held upon the complaint filed herein October 22, 1975, commencing at 9:00 a.m.

IT IS FURTHER ORDERED that bail be denied.

BY THE COURT

/s/ RONALD A. RUFF  
County Judge

[SEAL]

Filed Oct. 29, 1975—Ronald A. Ruff, County Judge

IN THE COUNTY COURT IN AND FOR LINCOLN COUNTY, NEBRASKA

Case No. 75-789

**THE STATE OF NEBRASKA, Plaintiff**

vs.

**ERWIN CHARLES SIMANTS, Defendant****JOURNAL ENTRY**

NOW ON THIS 21st day of October, 1975, at 7:30 p.m., this matter came on for Hearing upon the Motion of the State of Nebraska for a Restrictive Order. The defendant was present in open Court and represented by his attorneys, Leonard P. Vyhnales, and Keith Bystrom. The State of Nebraska was represented by Milton R. Larson, County Attorney, and Marvin L. Holscher, Chief Deputy County

Attorney. Also present was Mr. Harold Kay, who represented various news media, who were also present. The Honorable Ronald A. Ruff presided.

Said matter then came on for Hearing upon the State's Motion for a Restrictive Order. Mr. Vyhnalesk advised the Court that the defendant consented to the State's Motion, but at the same time, the defendant thereupon moved that the Preliminary Hearing, herein, should be closed to all persons except those persons participating in the Hearing. Mr. Vyhnalesk also objected that the news media had no right to intervene in this matter. Arguments were then presented to the Court by counsel and the Court took the matter under advisement.

The Court after being duly advised in the premises finds that the State's Motion should be sustained and that the Protective Order should be entered.

IT IS THEREFORE ORDERED that the Protective Order, which is being simultaneously executed herewith shall be and hereby is entered.

IT IS FURTHER ORDERED that the Motions of the State and of the defendant to sequester all witnesses at the Preliminary Hearing be and hereby are sustained.

BY THE COURT

/s/ RONALD A. RUFF  
County Judge

[SEAL]

Filed Oct. 29, 1975—Ronald A. Ruff, County Judge

IN THE COUNTY COURT IN AND FOR LINCOLN COUNTY, NEBRASKA

Case No. 75-789

THE STATE OF NEBRASKA, *Plaintiff*

vs.

ERWIN CHARLES SIMANTS, *Defendant*

### JOURNAL ENTRY

NOW ON THIS 22nd day of October, 1975, this matter came on for Preliminary Hearing. The defendant was present in open Court and represented by his attorneys, Leonard P. Vyhnalesk, and Keith Bystrom. The State of Nebraska was represented by Milton R. Larson, County Attorney, Marvin L. Holscher, Chief Deputy County Attorney, and John P. Murphy, Deputy County Attorney. The Honorable Ronald A. Ruff presided.

Mr. Harold Kay, attorney for various news media, made a statement to the Court.

The Court then made a statement, and read the Protective Order with respect to pre-trial publicity.

The defendant was thereupon arraigned upon the Amended Complaint. The defendant was again advised of his constitutional rights. Defendant's Motion to require the State to elect was overruled.

Evidence was adduced by the State and a noon recess was taken at 11:45 a.m. The State continued the introduction of evidence at 1:00 p.m. The Court again read the Protective Order with respect to the pre-trial publicity. The Court ordered that State's Exhibits 1, Exhibit 2, and Exhibit 3, be sealed in an envelope by the Court, and that the same not be opened except by order of the Court. The



State rested. The defendant offered no evidence. The defendant's Motion to dismiss Count II, Count III, Count IV, and Count V was overruled.

The Court being duly advised in the premises finds that the offenses charged in the complaint have been committed, and that there is probable cause to believe that Erwin Charles Simants, defendant, committed the offenses.

IT IS THEREFORE ORDERED that the defendant, Erwin Charles Simants, be and he hereby is bound over to the District Court of Lincoln County, Nebraska to stand trial upon all six (6) counts charged in the Amended Complaint.

IT IS FURTHER ORDERED that the defendant be held without bail.

BY THE COURT

/s/ RONALD A. RUFF  
County Judge

[SEAL]

**Affidavit of Kiley Armstrong**

Supreme Court of Nebraska, Filed Nov. 18, 1975—George H. Turner, Clerk

No. 40471

STATE OF NEBRASKA

COUNTY OF DOUGLAS, SS.

KILEY ARMSTRONG, being first duly sworn deposes and says as follows:

1. That she is employed as a newswoman by the Associated Press in Omaha, Nebraska, a news gathering cooperative association serving newspaper and broadcasting members throughout the world.

2. That on Sunday morning, October 19, 1975, in the County Court of Lincoln County, Nebraska, she attended the arraignment of Erwin Charles Simants, defendant in the case of the State of Nebraska, Plaintiff, vs. Erwin Charles Simants, Defendant, with Judge Ronald A. Ruff presiding. That during the arraignment proceedings the County Attorney of Lincoln County, Nebraska, Milton Larson, asked that part of the arraignment proceedings be closed on the grounds that an open hearing could be prejudicial to the rights of the defendant as far as a fair trial. That she was required to leave the courtroom for a period of 5-10 minutes. That in her absence the arraignment proceeding continued but that she has no personal knowledge as to exactly what transpired.

3. That on Wednesday morning, October 22, 1975, said Kiley Armstrong attended the Preliminary Hearing of said Erwin Charles Simants in the above captioned case, that before being allowed to enter the courtroom she was searched, that at the inception of the Preliminary Hearing, Judge Ruff discussed the problems of fair trial vs. free press and stated that in his opinion they are generally equal but that in this case fair trial must take precedent above free press. Then the bailiff passed out copies of a

"gag" court order per the instruction of the Court. The Judge reviewed said order and advised the reporters present that they could not report any testimony given at the Preliminary Hearing. The Judge then reviewed the Bar-Press Guidelines and told the reporters that they were to be followed unless his order which had just been passed out conflicted and then his order was to control.

4. That at said Preliminary Hearing Dr. Miles Foster testified as to technical subjects, tests and investigations performed and results thereof, and his opinions and conclusions from same; that he testified that all of the six deceased victims had been shot in the head. Two of the victims had been shot twice in the head and the 4 others only once. That in his opinion the holes in the head were made by .22 or .25 caliber bullets. That the powder burns on 2 of the victims indicated that they were shot from  $\frac{1}{2}$  to 2 inches away. That there were red speckles around 1 of the powder burns. That he found evidence of sexual assault on one of the victims, Florence Kellie, a 10-year old girl. That said Dr. Miles Foster further testified about the direction of the bullets, their passage through a portion or all of the heads of the victims, the finding of bullets and fragments and that all of the victims died of brain damage from being shot in the head.

5. That at said Preliminary Hearing, June Lindstrom, an ambulance driver, testified as to the place of the bodies in the home of the Kellies, that David Kellie, a male 32 years of age, was still alive, that bubbles were coming from his blood, that on the trip to the hospital, she continued to apply suction to the wound of David Kellie, that David Kellie died at the hospital, and that she knew the identity of the victims in that she had personally known them prior to the killings. That Kiley Armstrong further states that she knew all of the details testified to by June Lindstrom prior to her testimony at the Preliminary Hearing in that she had interviewed said June Lindstrom a few

days earlier and had learned all of the details as testified to in said interview. The Associated Press published said details prior to the Preliminary Hearing as testified to by June Lindstrom.

6. That at said Preliminary Hearing James Robert Boggs, a 13-year old nephew of Erwin Charles Simants testified that on Saturday night, October 18, 1975, defendant got a .22 caliber automatic rifle from the bedroom of James Robert Boggs' parents. That it was his impression that the defendant loaded said gun. That the defendant then told James Robert Boggs to keep the kids inside and don't tell anyone anything. That the defendant left the home for a period of approximately 10-15 minutes. That the defendant then returned to the home and set the rifle down in the kitchen. The defendant then sat down at a table and wrote something on a piece of paper. The defendant then went downstairs with the piece of paper. That the defendant then cleaned the rifle and put it back in the bedroom of his parents. That the defendant then told James Robert Boggs "I shot the Kellies. I did not want to shoot David and them, but he came in." Then the defendant told James Robert Boggs to call his grandma (Grace Simants), which he did. He then gave the phone to the defendant but did not hear the telephone conversation. James Robert Boggs then testified that the defendant left the home and told him not to tell anyone. That later, James Robert Boggs' parents found a written note downstairs on a fan. James Robert Boggs then testified as to what his parents told him was on the note and that he stated that it said "Don't cry. It was the only way."

7. That at said Preliminary Hearing, Amos Simants, father of the defendant, testified that his wife received a phone call from the defendant, that at about 9:00 P.M. the defendant came to their home, that the defendant told him "I beat the Kellies to death." That Amos Simants then testified that he did not believe the defendant so he went



to the Kellie's home to see for himself. That at the Kellie's home he saw two bodies on the floor and that there was blood on each of them, and that he then called for an ambulance. That Kiley Armstrong further states that she interviewed Mr. Lindstrom, husband of June Lindstrom, October 19, 1975, and that she was informed by Mr. Lindstrom that Amos Simants told Mr. Lindstrom that the night of the murder all of the details that Amos Simants testified to at the Preliminary Hearing and that the Associated Press published said details.

8. That at said Preliminary Hearing, Terry Livengood, Nebraska State Patrol Investigator, testified that he went to the Boggs' home and took possession of a .22 caliber automatic rifle and note reading "I am sorry. Do not cry. It was the only way."

9. That at said Preliminary Hearing Gordon D. Gilster, Lincoln County Sheriff, testified that he went to the Boggs' home, arrested the defendant at approximately 8:00 a.m. on Sunday morning, October 19, 1975, and took him into custody. He took the defendant to the jail and took a statement from the defendant. That he later took a second statement from the defendant and recorded it. Kiley Armstrong further states that about that time one of the defense attorneys for the defendant asked for a short recess so that he could examine the transcript of the "confession—I mean statement."

Further affiant sayeth not.

/s/ KILEY ARMSTRONG  
Kiley Armstrong

Subscribed and sworn to before me this 31st day of October, 1975.

/s/ JAMES L. KOLEY  
Notary Public

James L. Koley, General Notary State of Nebraska  
My Commission Expires October 10, 1976

Supreme Court of Nebraska, Filed Nov. 18, 1975—George H. Turner, Clerk

IN THE SUPREME COURT OF NEBRASKA

No. 40471

THE STATE OF NEBRASKA, ex rel NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTERS ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY; *Relators*,

vs.

THE HONORABLE HUGH STUART, Judge, District Court of Lincoln County, Nebraska, *Respondent*.

AFFIDAVIT OF STEPHEN T. MCGILL

STATE OF NEBRASKA  
COUNTY OF DOUGLAS, ss

STEPHEN T. MCGILL, being first duly sworn, upon oath deposes and states:

That I appeared in the District Court of Lincoln County, Nebraska on the 27th day of October, 1975, as attorney for the media in the case of State vs. Simants; that, in conjunction with those proceedings, the Honorable Hugh Stuart, District Judge in and for Lincoln County, Nebraska, presiding in the Simants case, read in open court an order restraining pretrial publicity dated October 27, 1975; that present at that hearing was the defendant, Simants, counsel for the media, defense and prosecution, various members of the press and the public; that the order as read



in open court was subsequently typed and made a part of the court file in the Simants case.

FURTHER AFFIANT SAYETH NOT.

/s/ STEPHEN T. MCGILL  
Stephen T. McGill

Subscribed and sworn to before me this 31st day of October, 1975.

/s/ LOUISE G. ANDERSEN  
Notary Public

General Notary, State of Nebraska, Louise G. Andersen  
My Commission Expires May 22, 1977

**Exhibit A2**

Filed Oct. 22, 1975—Ronald A. Ruff, County Judge

IN THE COUNTY COURT OF LINCOLN COUNTY, NEBRASKA

THE STATE OF NEBRASKA, *Plaintiff*

vs.

ERWIN CHARLES SIMANTS, *Defendant*

AMENDED COMPLAINT

(28-401)

STATE OF NEBRASKA,  
COUNTY OF LINCOLN:

Milton R. Larson, County Attorney of Lincoln County, Nebraska, for and in the name of the State of Nebraska, complains before a County Judge of Lincoln County, Nebraska that

ERWIN CHARLES SIMANTS

Defendant, on or about October 18, 1975, then in Lincoln County, Nebraska, did unlawfully

COUNT I

purposely and of deliberate and premeditated malice or in the perpetration of or attempt to perpetrate a sexual assault in the first degree, kill another, to wit: James Henry Kellie: and

COUNT II

Milton R. Larson being further duly sworn, complains that Erwin Charles Simants, defendant, on or about October 18, 1975, then in Lincoln County, Nebraska, did unlawfully, purposely and of deliberate and premeditated malice or in the perpetration of or attempt to perpetrate

a sexual assault in the first degree, kill another, to wit:  
Audrey Marie Kellie; and

### COUNT III

Milton R. Larson being further duly sworn, complains that Erwin Charles Simants, defendant, on or about October 18, 1975, then in Lincoln County, Nebraska, did unlawfully, purposely and of deliberate and premeditated malice or in the perpetration of or attempt to perpetrate a sexual assault in the first degree, kill another, to wit: David Leroy Kellie; and

### COUNT IV

Milton R. Larson being further duly sworn, complains that Erwin Charles Simants, defendant, on or about October 18, 1975, then in Lincoln County, Nebraska, did unlawfully, purposely and of deliberate and premeditated malice or in the perpetration of or attempt to perpetrate a sexual assault in the first degree, kill another, to wit: Daniel Leroy Kellie; and

### COUNT V

Milton R. Larson being further duly sworn, complains that Erwin Charles Simants, defendant, on or about October 18, 1975, then in Lincoln County, Nebraska, did unlawfully, purposely and of deliberate and premeditated malice or in the perpetration of or attempt to perpetrate a sexual assault in the first degree, kill another, to wit: Deanna Lynn Kellie; and

### COUNT VI

Milton R. Larson being further duly sworn, complains that Erwin Charles Simants, defendant, on or about October 18, 1975, then in Lincoln County, Nebraska, did unlawfully, purposely and of deliberate and premeditated

malice or in the perpetration of or attempt to perpetrate a sexual assault in the first degree, kill another, to wit: Florence Marie Kellie;

contrary to the statutes of the State of Nebraska.

/s/ MILTON R. LARSON  
County Attorney

SUBSCRIBED and sworn to before me on October 22, 1975.

/s/ RONALD A. RUFF  
County Judge

[SEAL]

**Exhibit D**

Filed 11:33 A.M., Oct. 23, 1975—I. L. Boyle, Clerk District Court

IN THE COUNTY COURT IN AND FOR LINCOLN COUNTY, NEBRASKA  
DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

Case B-2904

Doc. 71, No. 255

**THE STATE OF NEBRASKA, Plaintiff**

vs.

**ERWIN CHARLES SIMANTS, Defendant**

APPLICATION OF NEBRASKA PRESS ASSOCIATION, OMAHA  
WORLD-HERALD COMPANY, THE JOURNAL-STAR PRINT-  
ING CO., WESTERN PUBLISHING CO., NORTH PLATTE  
BROADCASTING CO., NEBRASKA BROADCASTERS ASSOCIA-  
TION, ASSOCIATED PRESS AND UNITED PRESS INTER-  
NATIONAL

COME NOW the Nebraska Press Association, an associa-  
tion representing in excess of two hundred (200) daily and  
weekly newspapers in the State of Nebraska; Omaha  
World-Herald Company, a Delaware corporation, the owner  
and publisher of the OMAHA WORLD-HERALD, a daily local  
newspaper printed and published in the City of Omaha,  
Douglas County, Nebraska; The Journal-Star Printing Co.,  
a Nebraska corporation responsible for the publishing of  
the LINCOLN STAR and the LINCOLN JOURNAL, daily local  
newspapers printed and published in the City of Lincoln,  
Lancaster County, Nebraska; Western Publishing Co., a  
Nebraska corporation, owner and publisher of the NORTH  
PLATTE TELEGRAPH; North Platte Broadcasting Co., a Ne-  
braska corporation, owner and operator of radio station  
KODY in Lincoln County, Nebraska; Nebraska Broad-  
casters Association, representing more than seventy (70)

radio and television stations in the State of Nebraska; and  
the Associated Press and United Press International, both  
of which are engaged in the dissemination of news to mem-  
bers locally, nationally and internationally, and respectfully  
show to the Court:

1. That the applicants herein are interested in these  
proceedings as members of the news media.

2. That the County Court of Lincoln County, Nebraska,  
has bound the defendant over to this Court, as shown by  
the transcript and records of the proceedings of that court  
and the filings herein, which by this reference are incorpo-  
rated herein as if fully set forth verbatim.

3. That the County Attorney of Lincoln County, Ne-  
braska, on behalf of the State of Nebraska, made a motion  
in the proceedings before the County Court with respect  
to pretrial publicity and the defense has joined in that  
motion.

4. That, in conjunction with the preliminary hearing be-  
fore the County Court, the Hon. Ronald A. Ruff, County  
Judge, entered an order, copy of which is attached hereto  
as Exhibit "A" and which is, by this reference, made a  
part hereof.

5. That the order of the County Court is repugnant to  
and in violation of the following provisions of the Consti-  
tution of the United States and the Constitution and Stat-  
utes of the State of Nebraska:

(a) Amendments No. I, VI and XIV to the Consti-  
tution of the United States.

(b) Article I, Sections 5, 11 and 13 of the Constitu-  
tion of the State of Nebraska.

(c) Sec. 24-311 R.R.S. 1943.



6. That the order of the County Judge is repugnant to and in violation of the general law of this State and this Nation in the following particulars:

(a) The third interest in a criminal proceeding is that of the general public in the operation of its legal institutions. Properly conducted preliminary hearings and trials, in addition to serving the interest of the accused and his connections and the interests of the victims and their connections, maintain the confidence of the community in the honesty of its institutions, in the competence of its public officers, in the impartiality of its judges, and in the capacity of its criminal laws to do justice. Public trial is and has been a basic tenet of our legal heritage. Equally basic to our system is the free interchange of information concerning our judicial system.

(b) The order of the County Judge, in effect, denies a public hearing by silencing all of those present; and the County Court's blanket gag rule is virtually unknown to our system of justice.

(c) The further order of the County Court precluding any party to this case, law enforcement official, public officer, attorney, witnesses or news media from disseminating any information concerning the above-described matter, apart from the preliminary hearing, is repugnant to a free society. It smacks of precensorship with the resulting evil of muzzling of a free press and it would even, apparently, prohibit the public and the press from the non-official investigative rights which have heretofore been assumed to be a part of our judicial system and a right of our society.

8. Notwithstanding that the jurisdiction of this matter is in this Court, since the Defendant has been bound over to this Court, the order of the County Court seems to say that it is to remain in effect until modified or rescinded by

a higher court or until the defendant is ordered released from the charges herein.

WHEREFORE, your Applicants respectfully request permission to appear in connection with the order of the County Court and to be heard thereon; and your Applicants further respectfully move the Court that this Court enter an order that the said order of the County Court of Lincoln County, Nebraska, be vacated and held for naught.

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTERS ASSOCIATION; ASSOCIATED PRESS AND UNITED PRESS INTERNATIONAL,

*Applicants*

By: /s/ STEPHEN T. MCGILL  
Stephen T. McGill  
for MCGILL, KOLEY & PARSONAGE, P.C.  
10050 Regency Circle, Omaha 68114  
Phone: 402-397-9988

and

By: /s/ HAROLD W. KAY  
Harold W. Kay  
for MAUPIN, DENT, KAY, SATTERFIELD,  
GIRARD & SCRITSMIER  
Dent Bldg., North Platte 69101  
Phone: 308-532-4466

*Their Attorneys*

Filed Oct. 27, 1975—I. L. Boyle, Clerk District Court

IN THE COUNTY COURT IN AND FOR LINCOLN COUNTY, NEBRASKA  
DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

THE STATE OF NEBRASKA, *Plaintiff*

VS.

ERWIN CHARLES SIMANTS, *Defendant*

APPLICATION OF THE NEBRASKA PROFESSIONAL CHAPTER OF  
THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA  
CHI

Comes now the Nebraska Professional Chapter of the  
Society of Professional Journalists/Sigma Delta Chi, a  
professional organization of journalists, and respectfully  
moves this Court to permit it to join in any and all plead-  
ings filed by the Nebraska Press Association, *et al*, who  
have previously made application to this Court.

THE NEBRASKA PROFESSIONAL CHAPTER OF THE  
SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA  
DELTA CHI,  
*Applicants*

By: /s/ STEPHEN T. MCGILL  
Stephen T. McGill  
for MCGILL, KOLEY & PARSONAGE, P.C.  
10050 Regency Circle, Omaha 68114  
Phone: 402-397-9988

and

By: /s/ HAROLD W. KAY  
Harold W. Kay  
for MAUPIN, DENT, KAY, SATTERFIELD,  
GIRARD & SCRITSMIER  
Dent Bldg., North Platte 69101  
Phone: 308-532-4466

*Their Attorneys*

# SUPREME COURT OF NEBRASKA

No. 40445

STATE OF NEBRASKA, *Plaintiff*

V.

ERWIN CHARLES SIMANTS, *Defendant*

## EXCERPTS FROM TRANSCRIPT

Filed Nov. 6, 1975—I. L. Boyle, Clerk District Court  
Supreme Court of Nebraska, Filed Nov. 13, 1975—George H. Turner, Clerk

IN THE DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

Case No. B-2904

THE STATE OF NEBRASKA, *Plaintiff*

VS.

ERWIN CHARLES SIMANTS, *Defendant*

## Bill of Exceptions

Tried before the HONORABLE HUGH STUART, Judge of  
the Thirteenth Judicial District of the State of Nebraska,  
on the 23rd and 27th days of October, 1975, at North  
Platte, Lincoln County, Nebraska.

## APPEARANCES

For the Plaintiff, Mr. Milton R. Larson and  
Mr. Marvin L. Holscher

For the Defendant, Mr. Keith N. Bystrom and  
Mr. Leonard P. Vyhnales

For the Interventors, Mr. Stephen T. McGill and  
Mr. Harold W. Kay

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## WITNESSES

| Intervenors' Witness   | Direct | Cross | Redir. | Recross |
|------------------------|--------|-------|--------|---------|
| 1. Mrs. Dorothy Kriz   | 16     | 41    | 41     | 41      |
| Defendant's Witness    | Direct | Cross | Redir. | Recross |
| 1. Hon. Ronald A. Ruff | 46     | 56    | 65, 71 | 66, 72  |

## EXHIBITS

| No.  | Exhibit   | Marked | Offered | Ruling | Found |
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| 1.   | Lincoln County Court<br>File, Doc. 75, Pg. 789                    | 17     | 38      | 39     | 39-A  |
| 2.   | Docket Sheet  | 17     | 38      | 39     | 39-B  |
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| 4-B. | Newspaper Clipping<br>North Platte Telegraph<br>October 20, 1975  | 50     | 55      | 65     | 65-B  |
| 4-C. | Newspaper Clipping<br>North Platte Telegraph<br>October 21, 1975  | 50     | 55      | 65     | 65-C  |
| 4-D. | Newspaper Clipping<br>North Platte Telegraph<br>October 21, 1975  | 50     | 55      | 65     | 65-D  |

## EXHIBITS

| No.  | Exhibit  | Marked | Offered | Ruling | Found |
|------|--|--------|---------|--------|-------|
| 4-E. | Newspaper Clipping<br>Omaha World-Herald<br>October 23, 1975     | 50     | 55      | 65     | 65-E  |
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| 4-I. | Newspaper Clipping<br>Omaha World-Herald<br>October 21, 1975     | 50     | 55      | 65     | 65-I  |
| 4-J. | Newspaper Clipping<br>Omaha World-Herald<br>October 21, 1975     | 50     | 55      | 65     | 65-J  |
| 4-K. | Newspaper Clipping<br>Kansas City Times<br>October 20, 1975      | 50     | 55      | 65     | 65-K  |
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## CERTIFICATE

I, Robert B. Miller, Official Court Reporter of the Thirteenth Judicial District of the State of Nebraska, do hereby certify that the within and following Bill of Exceptions contains all evidence, stipulations and motions offered at the hearings on the Application of the News Media had in the above-entitled case and all rulings of the Court thereon.

The complete Bill of Exceptions is in one volume, consisting of 89 typewritten pages of proceedings and testimony and 17 exhibits contained herein.

I further certify that said Bill of Exceptions is correct and complete and is in accordance with the Praeipie filed by the interveners herein; that the cost for the preparation of said Bill of Exceptions is in the amount of \$114.90, and that said sum is in compliance with Section 24-342 R.R.S. Neb. 1943, 1963 Cumm. Supp.; and that said charge includes a reasonable charge for preparation of exhibits for filing in this Bill of Exceptions.

/s/ ROBERT B. MILLER  
Robert B. Miller

6        Thereupon, At this time, 6:10 o'clock p.m., Central Daylight Time, on the 23rd day of October, 1975, the defendant appearing in the custody of the sheriff, and all counsel appearing as hereinbefore set forth, the following proceedings were had before the Honorable Hugh Stuart, District Judge of the Thirteenth Judicial District of the State of Nebraska, in the District Courtroom, Third Floor, Lincoln County Courthouse, North Platte, Nebraska, to-wit:

The Court: The case to be considered at this time is State of Nebraska versus Erwin Charles Simants, Case No. B-2904.

Mr. Vyhnaelek: Your Honor, if it please the Court, the applicants here have filed what appears to be a pleading to intervene in the case of State of Nebraska versus Erwin Charles Simants. And in the application they are attempting to either modify or dissolve the order entered by the Lincoln County Court. We would at this time orally, and ask leave later to file, a written motion to the effect to move to strike the application of the applicants, and, in

support of that motion, show to the Court that the  
7        applicants here, who, in their application, set forth they are various press associations, corporations and individuals who are engaged in the business of disseminating news information, have no standing to intervene in a criminal matter in which the State of Nebraska is the plaintiff and Erwin Charles Simants is the defendant.

In support of that motion we show to the Court that the processes for interventions in the State of Nebraska are all limited to civil actions under the provisions of Chapter 25, that the provisions of Chapter 25 have not been complied with in this attempt; that the application here has not been made in order to make the defendant a party; that the defendant here has and is now asking for all pre-trial hearings to be closed.

We would further move that the order which was entered by the Lincoln County Court on October 22nd, 1975, be continued until a complete hearing can be had on the question which is being raised by the application filed by the interveners. We would further show to the Court that at the time that the order was entered by the Lincoln

County Court, the original motion was filed by the  
8 Lincoln County Attorney's Office, that the defense at that time consented to the motion to have at least the restricted hearings; and that in addition to that we moved on behalf of the defendant to completely close all pretrial hearings prior to actual trial.

This is the extent of the motion at the present time. If the Court desires argument we are prepared to argue.

The Court: My understanding is that your oral motion is to not consider the motion filed by the—

Mr. Vyhnalesk: The many-named applicants.

The Court: —many-named applicants, represented by Stephen McGill and Harold Kay.

Mr. Vyhnalesk: Yes, sir. In other words, to clarify, since it is oral, not to consider the application, number one, and, I suppose this is an alternative pleading, that the order of the County Court stand until a further hearing be had, and, number three, to renew our motion in this court to completely close all pretrial proceedings.

The Court: Very well. I will consider that motion,  
9 your first motion, at this time, that one alone at this time, to-wit, the striking from the file of the application of the many news media represented by Mr. McGill and Mr. Kay. You may argue that motion.

(Thereupon, argument was made by Mr. Vyhnalesk, Mr. Larson, Mr. McGill and Mr. Kay. After which, the following further proceedings were had, to-wit:)

The Court: The Court is of the opinion that the case here involved does affect the people of the State of Nebraska, and although the official representatives of the peo-

ple of the State of Nebraska are the County Attorney and the Attorney General, as pointed out by the defendant, I do feel that the news media have a right to be in the case to a claimed infringement of their constitutional rights. And I refuse the defendant's motion to strike this application from the file.

Mr. Vyhnalesk: At this time, Your Honor, I would again renew my motion that the order of the County Court remain intact until such time as we can have a complete hearing, a complete evidentiary hearing on the  
10 question of asking the Court for an order to completely close all the pretrial hearings.

The Court: What do you contemplate in that connection, Mr. Vyhnalesk?

Mr. Vyhnalesk: You mean as far as the hearing is concerned?

The Court: Yes.

Mr. Vyhnalesk: I think, Your Honor, what I would suggest on behalf of the defendant that we have a hearing, since the Court has allowed the press to come in, at least according to the case that Mr. Kay has cited and some of these other things, there is an indication that the press does have the right to come in or could have the right to come in, that the matter of our asking for a closed or all closed hearings prior to the time of trial and their question as to whether or not the order of the County Court should be overturned because the order does provide that that order shall remain in effect until modified by the District Court, should be heard at the same time.

The Court: I understand what you tell me. I think I'm asking you more of a nuts and bolts question.

11 Mr. Vyhnalesk: On time?

The Court: I'm talking about time as to when you will be ready for such a hearing and how long you would anticipate that such a hearing would take?

Mr. Vyhnalesk: Well, first of all, Your Honor, with regard to our question now, let me say this, that with regard



to this particular application which has now been allowed by the Court there is an allegation here, at least in the opening parts of their application, that there are some 200 newspapers, 70 radio stations, and now apparently another applicant who is Sigma Delta Chi, who want to intervene, I think. Your Honor, the first thing that's going to be forthcoming on it is the news media to produce all the documentation with regard to the articles that have been run so far. We have apparently the burden of going forth with some proof on this. So, I would anticipate the first part of November.

The Court: I will grant your motion for a hearing. But, I think that we have got to recognize that this case has impact on all of the people of the State of Nebraska, 12 and that the lack of information with regard to the case can breed distrust for the Courts, and the delay of such a hearing would defeat the very purpose of the motion by the possible growing distrust of the courts because of the lack of information that the people represented by Mr. McGill and Mr. Kay claim.

I do presume to have an immediate hearing on the motion. I would be willing to go forward with an evidentiary hearing right now. If you need some time to prepare I would suggest preparing for such and going forward yet this evening. The reason that I suggest yet this evening is that I do have appointments in Lexington that I must keep tomorrow, and I have appointments of a personal nature on Saturday that I feel I must keep. Being more specific, my only daughter is getting married that day and it is a matter of considerable importance to me.

13 If you need time to prepare, I would give you some time now; but, I would presume to go ahead with this hearing yet this evening. If you are ready to go ahead with the hearing now, I'll listen to you.

Mr. Vyhnaelek: The defendant certainly is not prepared for the magnitude of the motion that has been presented here by the interveners on the grounds that we now have

an entire group of individuals in here that we didn't originally anticipate when the original order was entered. And, Your Honor, the uniqueness of it is that we apparently under this, at least even the case that Mr. Kay cited, are entitled or at least must go ahead with the burden of why we want a closed hearing. Now, we are not prepared for that certainly because we don't have either the clippings or the recordings of everything that was run on this matter. If the Court would indulge us, if the interveners would be willing to comply with a motion to produce at this point or within the next two or three days, we certainly would be willing to go ahead with the motion.

I would also point out, Your Honor, that the application of the interveners themselves ask that a 14 hearing be set at a later date, or whatever it is, a later time, a hearing be set.

The Court: They request permission to appear and be heard.

Mr. McGill: We want it clearly understood, Your Honor, that it is the position of our clients that they consider delay a denial of their constitutional rights and would like to have a hearing conducted as soon as it's possible for the Court to do so. And I'm trying—what I don't really understand that last remark of counsel—

Mr. Vyhnaelek: Well, I may have—I think that's in here. I was reading the other motion that was filed to be heard.

Mr. Kay: There was only one application.

Mr. Vyhnaelek: Okay. You mean just one, Harold?

Mr. Kay: That we filed.

Mr. Vyhnaelek: Okay.

Mr. Kay: We're asking for a hearing post-haste.

The Court: I certainly don't want to drag this thing out beyond reason, but I do think that the defendant is confronted with a new problem here. I did not note the time of the beginning of this hearing, but I think it was 15 approximately 6 p.m. It is now 6:40. I will adjourn this hearing at this time and we will take up the



hearing at 8 p.m. I would presume at that time to go forward with the evidentiary hearing. Court is adjourned.

(Thereupon, Court was adjourned until 8 o'clock p.m., at which time, all counsel and the defendant being present, the following further proceedings were had, to-wit:)

The Court: At this time we will proceed to hear the evidentiary presentation on the motion filed by the people denominated first as the Nebraska Press Association. Do you desire an opening statement, Mr. Kay?

Mr. Kay: No. We will waive opening statement, Your Honor.

The Court: Mr. Larson, do you desire an opening statement with reference to this motion?

Mr. Larson: No, Your Honor.

The Court: Mr. Vyhnalek, Mr. Bystrom?

Mr. Bystrom: No, Your Honor, we have no opening statement.

16 The Court: Very well. Mr. Kay, call your first witness.

Mr. Kay: Judge Kriz, would you take the stand, please?

**Mrs. Dorothy Kriz**

Called as a witness on behalf of the Interveners, after having first been duly sworn by the Court to testify the truth, the whole truth, and nothing but the truth, testified as follows:

**Direct Examination**

By Mr. Kay:

Q. Would you state your name, please? A. Dorothy Kriz.

Q. And where do you live, Mrs. Kriz? A. In North Platte.

Q. And what is your occupation? A. I am the Associate Judge, Clerk of the Lincoln County Court.

Q. That's here in North Platte? A. Yes.

Q. And how long have you had that position? A. About a year and a half.

17 Q. As Associate County Judge what are your duties? A. Well, I mainly see to the administrative part of the operation of the Lincoln County Court.

Q. Would this include preparing orders and journals? A. Yes.

Q. And keeping custody of the court files and records? A. Yes.

Q. And preparing docket notes for the court? A. I don't directly, but I have a court reporter that does.

Q. And are those prepared under your supervision? A. Yes.

Q. And who is the District Court County Judge of Lincoln County at this time? A. Judge Ronald Ruff.

Q. And how long has he had that position? A. About two, a little over two and a half years.

Q. Now, are you familiar with the case of State versus Erwin Charles Simants? A. Yes.

Mr. Kay: May I approach the witness, Your Honor.

The Court: You may.

(Thereupon, Exhibits Nos. 1, 2 and 3 were marked for identification by the Reporter.)

18 Q. (By Mr. Kay) Now, Judge Kriz, I am handing you what has been identified by the Court Reporter as Exhibit No. 1, and I ask you what that is? A. This is our, the court file on the case of State of Nebraska versus Simants.

Q. And what is the number of that case in the Lincoln County Court? A. Docket 75, Page 789.

Q. Is that file under your custody and control? A. Yes.

Q. I am handing you what has been identified as Exhibit No. 2, and I ask you what that is? A. This is the docket sheet of the same case.

Q. Are you familiar with that docket sheet? A. Yes.

Q. And have you looked at it before? A. Yes, I have.

Q. Have you prepared any journals entries or orders from those notes? A. No, I haven't, not from these notes.

Q. Well, have you used them to assist yourself in preparing orders, such as the order that was recently entered in connection with the so-called "gag order"? A. Only for the heading.

Q. Yes. Now, I hand you Exhibit No. 3, and I  
19 ask you what that is? A. That is a claim to Lincoln County for the witness fees.

Q. Now, do Exhibits 2 and 3, were they included as part of the court file which has been identified as Exhibit No. 1? A. No, they won't be.

Q. Now, referring to Exhibit No. 1, there is a pleading in Exhibit No. 1 which is entitled "Motion For Restrictive Order." Would you please tell the Court when that motion was filed, on what date and what time?

Mr. Vyhnalek: Objected to as being incompetent, irrelevant, immaterial, and without the scope of the inquiry in these proceedings.

The Court: Overruled.

A. It was filed on the 21st day of October, approximately 7 o'clock p.m.

Q. (By Mr. Kay) Now, what are the hours of the Lincoln County Court? A. The hours of the Lincoln County Court are from 8 a.m. to 5 p.m.

Q. So, it was filed after the court was closed, was that correct? A. Yes.

Q. And were you present when it was filed?  
20 A. Yes.

Q. Now, on or about October 21 did you have occasion to contact certain local news media? A. Yes, I did.

Q. And could you please tell the Court who told you to contact the local media? Or who directed you to do so? A. Judge Ruff.

Mr. Kay: May I go back to the counsel table?

The Court: Yes.

Q. (By Mr. Kay) And when did he tell you to contact the local media?

Mr. Vyhnalek: I object to that, Your Honor, on the grounds that it's hearsay, immaterial, irrelevant, incompetent; completely without the scope of the issue in this area. Counsel is referring to individuals who at this time are not a party to this action and were not a party to the action in the Lincoln County Court.

The Court: Overruled. She may answer when this happened. She may not repeat the exact verbatim remarks as being hearsay. The question, Judge, was "When." A.  
About 4:30.

21 Q. (By Mr. Kay) On what date? A. On the 21st.

Q. And this was prior to the time that the motion which you just testified about was ever filed, was this correct? A. Yes.

Q. And whom did you contact? A. I called Mr. Huttenmaier of KODY.

Q. Now, this would be KODY, which is an affiliate with the North Platte Broadcasting Company? A. Yes, a radio station.

Q. And they're an applicant in this action, are they not? A. Yes, I believe so.

Q. And whom else did you contact? A. I called Dan Meyers of KAHL Radio Station, and I called Mr. Don Feldman of KNOP TV.

Q. Anybody else? A. The newspaper was contacted by Judge Ruff for the reason that he had discussed this in his office and he was going to call the news media and he decided to call the newspaper because he thought they maybe would not have anyone there after 5 o'clock and we wouldn't know who to contact after 5. And after he called  
the newspaper it was more or less my suggestion  
22 that I then contact the other news media.

Q. You were contacting the local news media which you referred to on behalf of Judge Ruff and at his request, as I understand it. A. Yes.



Q. And did you contact all three media at or about the same time? A. Yes.

Q. And about what time was that? A. It was about 4:30.

Q. On the 21st of October, 1975? A. Yes.

Q. And would you tell, first of all, who did you contact at KODY? A. I talked to Mr. Huttenmaier.

Q. And what did you tell Mr. Huttenmaier at that time? A. I told him that Judge Ruff had thought he may have some news that may be of some importance to the news, and that he would like to have him come about 7:30 and that we, I would be downstairs at the south door to let him in.

Q. And what did you tell the gentleman at Radio Station KAHL? A. Approximately the same thing.

23 Mr. Vyhnalesk: Your Honor, I still want to object for the record on this matter, that is totally and completely irrelevant to the inquiry in this case. The news media has had their petition in intervention allowed by this Court at this point, and all this matter surrounding the Lincoln County Court's apparent notification is totally irrelevant.

The Court: Overruled.

(Thereupon, the last question and answer were read by the Reporter.)

Q. (By Mr. Kay) And the gentleman at the local television station? A. The same thing too.

Q. Did you tell any of these people that you called that a motion had been filed to restrict the coverage, the media coverage in this case? A. No.

Mr. Vyhnalesk: I object and move to strike that on the grounds that it's irrelevant.

The Court: Overruled.

Q. (By Mr. Kay) Did you advise any of the members of the media who you called that there was going to be a hearing on any motion at 7:30 p.m. in the Lincoln County

24 Court on October 21, 1975, concerning such a motion? A. No.

Mr. Vyhnalesk: Same objection.

The Court: Overruled.

Q. (By Mr. Kay) Now, did you leave the court that day and go home in the evening or did you stay at the court?

A. No, I—

Mr. Vyhnalesk: I object to that. I object to all this line of questions on the grounds that it's totally irrelevant.

The Court: I fail to see the relevancy, Mr. Kay.

Mr. Kay: I'm laying the foundation that she was there at 7:30.

The Court: The objection is sustained.

Q. (By Mr. Kay) Okay. Were you there at 7:30, at the Lincoln County Court at 7:30 p.m. on October 21, 1975?

A. Yes, I was.

Q. And when did you arrive at the court? A. I was in the court about 6:15.

Q. Now, did you, yourself, have occasion to come out of the court into the lobby? A. Yes, I did.

25 Q. And about what time was that?

Mr. Vyhnalesk: I object, Your Honor. This is all irrelevant.

The Court: Sustained.

A. I—

The Court: Sustained. You don't have to answer.

Q. (By Mr. Kay) Did you have any occasion to contact the news media at anytime there in front of the Lincoln County Court prior to 7:30 p.m. on October 21, 1975?

Mr. Vyhnalesk: To which we object as irrelevant.

The Court: I'm not sure where you're going with this, Mr. Kay.

Mr. Kay: I would like to show that the witness had a conversation with some members of the news media at that time and place as an official of the court.

The Court: Very well. The objection is overruled pending upon further showing of relevancy.

A. Yes, I did.



Q. (By Mr. Kay) Now, at that particular time was there any hearing going on in the Lincoln County Court, or was anybody occupying the Lincoln County Court?  
26 A. Yes.

Q. And who was in the courtroom at that time, if you know?

Mr. Vyhnalesk: We object to this as being totally, absolutely and completely immaterial, and there is no foundation laid, and it's not a proper foundational question.

The Court: Overruled.

Mr. Kay: You may answer.

(Thereupon, the last-pending question was read by the Reporter, to-wit: "Question: And who was in the courtroom at that time, if you know?")

A. I was trying to recall—I believe Mr. Larson was there.

Q. (By Mr. Kay) The county attorney? A. Yes; and Mr. Vyhnalesk was there.

Q. The deputy or assistant public defender? A. Uh-huh. And Judge Ruff, Judge Byrnes, Judge Myers—I don't recall if Mr. Bystrom was there at all.

Q. Now, when you came out and talked to the media there was this while they were all in the courtroom? A. Yes.

Q. And what did you tell the media at that time?  
27 Mr. Vyhnalesk: I object to that as being irrelevant.

The Court: Overruled.

A. I just went out and asked the gentlemen to please go to the first floor and when we were ready for them I would come down and get them.

Q. (By Mr. Kay) And then what did you do then, later?  
A. I went back into the courtroom.

Q. And then did you later go down and talk to the news media? A. No. I believe Judge Byrnes went.

Q. And then were you in the court at 7:30? A. Yes.

Q. And who was there at that time? A. The gentlemen that I mentioned before, and—

Q. Did you ever leave the courtroom at anytime during the time that you went out and told the media to go downstairs and then you came back up? A. Yes. Before the hearing, yes.

Q. What time did the hearing commence? A. Shortly after 7:30.

Q. And would you tell the Court, please, who was in the courtroom at that time, at the time of the commencement of the hearing? A. Well, the gentlemen that I mentioned before, plus the Deputy County Attorney, Mr. Holscher, and the defendant, and the sheriff, and the news, various members of the news media, and you were present.

Q. Yes. And was there a hearing held at that time? A. Yes.

Q. And was a record made of that hearing? A. Yes.

Q. And was there a statement made by the County Attorney, Mr. Larson? A. Yes.

Q. A statement made by Mr. Vyhnalesk? A. Yes.

Q. And was there a statement made by myself? A. Yes, there was.

Q. Was anyone called to testify? A. No.

Mr. Vyhnalesk: I object to that, Your Honor. The record of the court speaks for itself. And I move to strike the answer.

The Court: Overruled.

Q. (By Mr. Kay) Were exhibits offered in evidence?

Mr. Vyhnalesk: Objection, same objection.

The Court: Overruled.

A. No.

Q. (By Mr. Kay) Was any evidence adduced at this so-called hearing on the motion?  
29

Mr. Vyhnalesk: We object. The record of the court speaks for itself. There is testimony in the record already which indicates that a record was made.

The Court: Overruled.

A. No.

Q. (By Mr. Kay) Now, there was an order entered, as I understand, following the so-called hearing. A. Yes.

Mr. Vyhnalesk: I object to that, referring to that as a "so-called hearing" and move to strike it. This thing is getting bad enough without stuff like that in here.

The Court: The objection is sustained, and the reference to the "so-called hearing" is stricken.

Q. (By Mr. Kay) Was there any evidence given at the hearing which would indicate that there was any testimony which might be given at the preliminary hearing which would be prejudicial to the defendant?

Mr. Vyhnalesk: I object to that as being totally immaterial, incompetent, irrelevant; further show that while this witness has testified that she is an Associate Judge of the County Court she was not sitting, and the question of whether or not there was evidence introduced at that trial is one which, I've always been under the impression, the Judge decides.

The Court: It seems to me that you're calling for a conclusion of the witness. The objection is sustained.

Q. (By Mr. Kay) Well, I'll come back to it this way: As I understand it, there was absolutely no evidence introduced in any manner, shape or form.

Mr. Vyhnalesk: Same objection.

The Court: Overruled.

Q. (By Mr. Kay) Is that a correct statement? A. I believe there was a motion that Judge Ruff—

Q. But, I'm talking about evidence. A. No.

Q. Is that a correct statement that I made?

Mr. Vyhnalesk: I object to that, as putting counsel's statement into evidence in this hearing.

The Court: Sustained.

Q. (By Mr. Kay) Your answer was "No" I think, just so we have an understanding here? This is all I want. As I understand it, there was absolutely no evidence.

Mr. Vyhnalesk: Asked and answered, Your Honor, at least three times.

The Court: Sustained.

Mr. Kay: Is the Court taking the position that the question has been answered?

The Court: Yes.

Mr. Kay: Fine.

Q. (By Mr. Kay) Now, did you, yourself, prepare an order in connection with this hearing?

Mr. Vyhnalesk: I object to that.

The Court: Overruled.

Mr. Kay: May I approach the—

The Court: You may go ahead and answer it.

A. I typed an order.

Q. (By Mr. Kay) And when did you type that order, Judge? A. On the 21st, the evening of the 21st.

Q. And would you tell us when you started typing the order? A. I believe it must have been about a quarter of 9—wait a minute—quarter of 10, I beg your pardon.

Q. And what time did you complete typing the order?

A. About 10:30.

Q. Now, was there anything in this order which would indicate that I was there at the hearing?

Mr. Vyhnalesk: Objected to as being totally immaterial, irrelevant.

The Court: The objection is sustained on the grounds of best evidence.

Mr. Vyhnalesk: Okay.

Q. (By Mr. Kay) Was I at the hearing? A. Yes, you were.

Q. Now, will you examine the order, I'm referring to the order of the Court in Exhibit 1, would you identify that for the Court by placing a "D" above the word "Order"?

Mr. Vyhnalesk: I object to marking-up the court record of the Lincoln County Court, Your Honor. This is a matter which is going to be pending in the Lincoln County District Court, and that may become evidence in the case in which



Mr. Simants is charged. And I object to having anything placed on that record other than what appeared during the time of the proceedings in the County Court.

The Court: I do not feel that we should mark the records of the Lincoln County Court. The objection is  
33 sustained.

Mr. Kay: I wanted to identify the order for the record.

The Court: I do not feel that we should take that liberty with the records of the County Court.

Mr. Kay: I want to identify the order some way to the Court so this Court will know what order we're talking about. If the witness would show it to the Court at this time?

The Court: I'm sure I'll be able to find it. Yes, I see it.

Q. (By Mr. Kay) And when did you file that order? A. On the morning of the 22nd.

Q. Can you tell us when the order was signed?—

Mr. Vyhnales: I object—

Q. (By Mr. Kay) —by the Court?

Mr. Vyhnales: —incompetent, irrelevant, immaterial. The record speaks for itself.

The Court: Overruled.

A. I can't tell you when it was signed because I didn't see when it was signed.

Q. (By Mr. Kay) I see. Now, I noticed under this order, under the judge's signature, there is the date "October 22, 1975." Does that mean anything to you in your position?

34 Mr. Vyhnales: Objected to as immaterial.

The Court: Overruled. I don't think the witness understands your question, Mr. Kay.

Mr. Kay: May I approach the witness?

The Court: You may.

Q. (By Mr. Kay) I am handing you what has been identified as Exhibit No. 1, and I'm referring to the order of the Court which you typed. A. Uh-huh.

Q. Which you say was filed on October 22, 1975. Now, referring to the third page thereof, under Judge Ruff's signature there is a date, "October 22, 1975." And I will ask you if that has any significance as far as you are concerned? A. Yes. I believe that would indicate that this is the day that he signed the order.

Q. Now, as the record keeper of the court, as Associate County Judge, you are aware of the fact that there was a preliminary hearing held in this case on the 22nd of October, 1975, are you not? A. Yes.

Q. And you are aware of the fact that the defendant was bound-over to the Lincoln County District Court on that date.

35 Mr. Vyhnales: To which we object on the grounds that this matter is still pending, that time for filing of motions by the defendant is not passed, and that for this witness to be allowed to give that conclusion is irrelevant and highly prejudicial to this defendant.

The Court: Sustained on the ground of best evidence.

Mr. Kay: Approach the witness?

The Court: You may.

Q. (By Mr. Kay) I'm referring to Exhibit No. 2. Would you state what that is? A. That is a docket sheet.

Q. And would you examine the docket sheet on both sides? — And that docket sheet was prepared under your supervision and direction?

Mr. Vyhnales: I object.

The Court: Overruled.

A. Yes.

Q. (By Mr. Kay) And would you please read the docket note on October 22, 1975?

Mr. Vyhnales: I haven't had the opportunity to examine that exhibit. May I before I make an objection, Your Honor?

The Court: You may.

36 (Thereupon, Mr. Vyhnales was handed Exhibit No. 2.)



Mr. Vyhnalesk: Now, Your Honor, with regard to the exhibit which the witness has testified to, Exhibit No. 2, we object first of all on the grounds that the exhibit speaks for itself; further, that this particular exhibit contains matters involving the proceedings in the County Court of Lincoln County, Nebraska, with regard to motions filed prior to the time of the preliminary hearing held in this matter, and also the account as per the Judge of the proceedings in the preliminary hearing. This matter, the transcript of this has not been up to the Lincoln County District Court as yet, and to allow this matter into evidence is absolutely and completely and totally prejudicial to this defendant, immaterial, irrelevant and incompetent.

The Court: I'm not sure that I understood the last question asked of the witness. You said to read a certain entry there. Do you mean to herself or aloud?

Mr. Kay: What was that, Your Honor?

37 The Court: Did you mean to read it to herself or aloud?

Mr. Kay: I wanted her to read it to herself and I would ask her——

The Court: She may read the item.

Mr. Kay: May I approach the witness?

The Court: Yes. Not aloud, simply to yourself.

(Thereupon, the witness read Exhibit No. 2.)

Q. (By Mr. Kay) Have you read the entry on October 22, 1975? A. Yes.

Q. Have you had a chance to examine Exhibit No. 2? A. No.

Q. Well, would you do so? —. Have you done so? A. Uh-huh.

Q. Is that a true and correct copy of the docket sheet entry in connection with—I don't believe the case number is on here—it says Page 789. A. We don't have a case number; just the docket.

Q. In the case of State versus Erwin Charles Simants,— A. Yes.

Q. Is that a true and correct copy of the notes? A. Yes.

38 Q. And those notes are under your care and supervision—— A. Uh-huh.

Q. —and custody and control? A. Uh-huh.

Q. Okay. The same goes for Exhibits 1 and 3? A. Yes.

Mr. Kay: We will offer Exhibits 1, 2 and 3.

Mr. Vyhnalesk: May I examine those exhibits, please?

The Court: You may.

(Thereupon, Exhibits Nos. 1, 2 and 3 were handed to Mr. Vyhnalesk.)

Mr. Vyhnalesk: Your Honor, with regard to Exhibits 1, 2 and 3 we object on behalf of the defendant in that this appears to be the entire proceedings, at least as far as the transcript is concerned, in the Lincoln County Court in the matter of State of Nebraska versus Erwin Charles Simants; that this matter and the transcript has not as yet been lodged with the District Court; that the time of filing of motions and other preliminary pretrial matters by the defendant has not passed; that the admission of these exhibits at this time is without the formal proceeding of the criminal trial in this matter. It is therefore unduly prejudicial, irrelevant, incompetent, immaterial; and, further, that docket sheet has many entries on it with regard to the proceedings in this matter, all of which are subject of motions in this court.

39 Mr. Kay: Your Honor, may I—If it would be all right, would the Court, we would request that we make photocopies of those exhibits and return the originals to the County Court. We certainly don't want to interfere in any way with their records.

The Court: Yes. We must return them to the County Court. The objection is overruled. Exhibits Nos. 1, 2 and 3 are admitted in evidence for the purposes of this hearing only, and leave is given to substitute copies.

Mr. Kay: I think I just have one more question or two.

Q. (By Mr. Kay) Do you remember when you came out and talked to the media and asked them to go down to the first floor, do you recall if I was there at that time? A.

Yes, I believe you were.

40 Q. And did you ever tell me that these other people were in the courtroom? A. No.

Q. Was there any other hearing on that order that was entered on October 22, 1975?

Mr. Vyhnalesk: Objected to as being without the scope of the knowledge of this witness; irrelevant, incompetent, immaterial. The court records speak for themselves.

The Court: Would you read the question again?

(Thereupon, the last-pending question was read by the Reporter, to-wit: "Question: Was there any other hearing on that order that was entered on October 22, 1975?")

The Court: Overruled.

Q. (By Mr. Kay) In court or in chambers? A. On October 22? What date?

Q. I'm referring to the order that was entered on October 22, 1975. A. No.

Mr. Kay: That's all.

The Court: Mr. Vyhnalesk, you may inquire.

Mr. Vyhnalesk: I have no questions.

41 The Court: Mr. Larson, you may inquire.

#### Cross Examination

By Mr. Larson:

Q. Mrs. Kriz, what instructions did you receive from Judge Ruff relative to requesting that the news media retire to the first floor?

Mr. Vyhnalesk: That's asking for a hearsay answer, Your Honor, object.

The Court: Sustained.

Q. (By Mr. Larson) Were you instructed at any time to exclude Mr. Kay from the courtroom? A. No.

Mr. Larson: No further questions.

#### Re-Direct Examination

By Mr. Kay:

Q. Did you know that I represented the news media at the time that you came there and told them, all of us to go downstairs? A. No, I did not.

Mr. Kay: That's all.

#### Re-Cross Examination

By Mr. Vyhnalesk:

42 Q. Mrs. Kriz, did Mr. Kay ever make it known to you prior to 7:30 on the 21st of October that he did represent the news media? A. I have a vague, that he vaguely did when they came back upstairs after Judge Byrnes had gone down, that he did come in the room, in the court—not in the courtroom—but in the office and say something about, that he represented them. But I really don't recall.

Q. And that would have been at about 7:30 when Judge Byrnes went downstairs, is that right? A. Yes.

Mr. Vyhnalesk: I have nothing further. Thank you, Mrs. Kriz.

The Court: Mr. Larson, do you have further questions?

Mr. Larson: That's all, Your Honor.

The Court: You may step down.

Mr. Kay: May the witness be excused, if she'd like to be excused?

The Court: Do you have any objection, Mr. Vyhnalesk?

Mr. Vyhnalesk: I have no objection, Your Honor. However, in the event that it is necessary to recall her I'm sure that she would be available.

43 The Court: Mr. Larson?

Mr. Larson: No objection, Your Honor.

The Court: You may be excused, Judge Kriz, if you desire. Of course, you're welcome to stay.

Mr. Kay: Now, Your Honor, may we approach the bench?

The Court: Yes.

(Thereupon, a conference at the bench between Court and counsel was had out of the hearing of the Reporter. After which, the following further proceedings were had, to-wit:)

The Court: Do you desire to introduce evidence, Mr. Vyhnalek?

Mr. Vyhnalek: Your Honor, with regard to the motion to intervene, which I take it this was the evidence which we were operating on, or I think they were operating on, we have no evidence to present on that. Are we now going to consider the other phases of that motion that I made?

The Court: No, I'm only taking up the one motion at this time, taking evidence on this motion that was filed by the Nebraska Press Association and others.

44 Mr. Vyhnalek: Then, do I understand from the Court that we would have a later time to come in with our evidence with regard to any clear and present dangers?

The Court: Yes, you will have.

Mr. Vyhnalek: Thank you, Judge.

The Court: Mr. Larson, do you have evidence on this motion?

Mr. Larson: No, Your Honor.

The Court: Very well. This motion is necessarily coupled with other motions, and before I hear arguments on the motion I will listen to evidence on other motions that have been filed. You filed or made a three-pronged oral motion, Mr. Vyhnalek. I would like to hear the evidence on your motions now, either separately or in conjunction with each other.

Mr. Vyhnalek: Okay. I think it will be in conjunction with each other. The other one was to continue the order

until the Court makes its determination, and, secondly, a motion to close the pretrial proceedings completely.

The Court: Yes.

45 Mr. Vyhnalek: And, in that respect, we will call Judge Ronald Ruff.

The Court: Just a minute, Judge Ruff.

Before you call him, do you want to make opening statements on this?

Mr. Vyhnalek: No, Your Honor.

The Court: Mr. Larson, do you?

Mr. Larson: No, Your Honor.

The Court: Mr. Kay, do you?

Mr. Kay: No.

The Court: Would you come up and be sworn, Judge Ruff.

Mr. McGill: Your Honor, could we have a clarification, exactly what motion are we talking about?

The Court: There are two oral motions that Mr. Vyhnalek made. One was to close all of the pretrial hearings; and, the second motion was to continue the County Court's order for restriction of reporting. And I was presuming to take evidence on both of these oral motions at this time.

46

**Hon. Ronald A. Ruff**

Called as a witness on behalf of the Defendant, after having first been duly sworn by the Court to testify the truth, the whole truth, and nothing but the truth, testified as follows:

### Direct Examination

By Mr. Vyhnalek:

Q. Would you state your name, please? A. Ronald Ruff.

Q. Your address? A. 921 Union, North Platte, Nebraska.



Q. What is your occupation? A. Lincoln County Judge.

Q. And were you Lincoln County Judge on October 21 and 22 of 1975? A. I was.

Q. And you are a County Judge at the present time, is that right? A. That's correct.

Q. On October 21, 1975, did you enter any orders in the matter of the case pending in the Lincoln County Court, State of Nebraska versus Erwin Charles Simants? A. On the 21st?

47 Q. Yes, sir—I'm sorry—Strike that. The 22nd.

A. The order was officially signed on the 22nd day of October, 1975.

Q. Did you enter an oral order on the night of October 21st? A. I did.

Q. And does the written order that you have before you essentially outline or does that constitute the order?

Mr. Kay: We will object to the question on the basis that the order speaks for itself, the best evidence.

Mr. Vyhnalesk: Well, I'm referring to the order.

Mr. Kay: It speaks for itself.

Mr. Vyhnalesk: That's all I'm asking, is if that is the order.

The Court: The objection is overruled. A. Would you repeat the question please?

(Thereupon, the last-pending question was read by the Reporter, to-wit: "Question: And does the written order that you have before you essentially outline or does that constitute the order?")

A. Yes.

48 Q. (By Mr. Vyhnalesk) That is the order? A. Yes.

Q. All right. In connection with signing that order did you consider the matters which were made subject of that order?

Mr. Kay: We will object to the question as calling for a conclusion of the witness; no proper foundation.

The Court: The objection is sustained.

Q. (By Mr. Vyhnalesk) Judge Ruff, how long have you lived in the North Platte community? A. Presently I have lived here since July of 1972; prior to that I was gone for 13 years; prior to that I lived here all my life except for the first three years. Whatever that adds up to; I'd have to——.

Q. During the days of October 19th through 22nd were you familiar with the types of news information being disseminated in Lincoln County, Nebraska, with regard to the matter pending in your court entitled State of Nebraska versus Erwin Charles Simants?

Mr. Kay: To which we object as incompetent, irrelevant, immaterial.

The Court: Overruled.

A. Yes.

Mr. Vyhnalesk: Could we make all these one exhibit, Judge? There's a whole batch of stuff.

49 The Court: I think that would be all right to mark it——

Mr. Kay: Your Honor, in order to save time we will stipulate with counsel that we have a newspaper here in North Platte by the name of the North Platte Telegraph.

Mr. Vyhnalesk: I'm not interested in that, Your Honor. I want all those things into evidence.

Mr. Kay: May I finish my statement?

The Court: Go ahead.

Mr. Kay: We will stipulate that there is a newspaper in North Platte called the North Platte Telegraph, and that Mr. Vyhnalesk is having identified, I assume, a number of issues of the North Platte Telegraph, and will waive any foundation and stipulate and agree that they can be offered into evidence.

The Court: Very well. Proceed to mark them, Mr. Miller. Just hold it up until he gets them marked, please.

Mr. Kay: The reason I want to make this statement, I thought that these were all North Platte Telegraph papers, and they are not.

The Court: Well, let's wait until he gets them marked.

50 (Thereupon, Exhibits Nos. 4-A through 4-N were marked for identification by the Reporter.)

Mr. Vyhnalesk: Prior to asking for a stipulation, if that would be in order from interveners' counsel, we would show to the Court that with regard to Exhibit 4-A through N these matters will be submitted to Judge Ruff for his examination, as to whether or not he was aware as to the publicity afforded this particular matter and as to whether or not these items are representative of that publicity, together with whatever knowledge he had of radio and news coverage and television and newspaper coverage in this particular matter, and that he was aware of such on the 21st day of October, 1975.

And, I would further submit that that would be relevant in that this was the judge that had the jurisdiction of the case at that time and he has a sua sponte duty to do something.

Mr. Kay: May I make a statement as to what I will do? The Court: Certainly.

Mr. Kay: We will stipulate that Exhibit 4-A is the October 23rd, 1975, issue of the North Platte Telegraph; 51 4-B is an October 20 issue of the North Platte Telegraph; that Exhibit 4-C is a news article from the November 21st, 1975 issue of the North Platte Telegraph—excuse me—October 21st, 1975, issue of the North Platte Telegraph; that Exhibit 4-D purports to be I think an article from the October 21st issue of the North Platte Telegraph pertaining to the Kellie family funeral; Exhibit 4-E purports to be an article from the Omaha World-Herald, October 23rd issue; that Exhibit 4-F purports to be an article from the October 21st issue of the Lincoln Star; that Exhibit 4-G purports to be an article from the October 20, 1975, issue of the Lincoln Star; that Exhibit 4-H is an article from the North Platte Telegraph issue of Octo-

ber 22, 1975; Exhibit 4-I is an article from the Omaha World-Herald, I believe the date is October 21, 1975; that Exhibit 4-J is an article from the October 21st issue of the Omaha World-Herald; that Exhibit 4-K is the October 20th, 1975 Morning Edition of the Kansas City Star; that Exhibit 4-L is the October 20 issue of the Omaha World-Herald; that Exhibit 4-M is the October 21st issue of the Denver Post; and that Exhibit 4-N is another issue of the North Platte Telegraph dated October 20, 1975.

52 The Court: Do you so stipulate, Mr. Vyhnalesk?

Mr. Vyhnalesk: You have all of them there, I take it. Yes, we so stipulate.

The Court: Do you agree to that, Mr. Larson?

Mr. Larson: Yes, Your Honor, so stipulated.

The Court: It will be so shown.

Mr. Vyhnalesk: Do you further stipulate to their admission?

Mr. Kay: No, I don't. I will stipulate with you that certain items there can be admitted for the sole purpose, and I would want to specify which ones there are—I mean, I have no argument—

Mr. Vyhnalesk: My only purpose, as I advised you, Mr. Kay, is when I offered them was that we would show the amount of publicity that this particular matter received, and that it was a local, state, regional and national scope.

Mr. Kay: I think that our remarks should be made to the Court rather than between counsel.

The Court: That is true.

Mr. Vyhnalesk: That is true. I apologize to the Court on that.

53 The Court: All right. Would you return them then to Mr. Vyhnalesk, please?

Q. (By Mr. Vyhnalesk) Now then, Judge Ruff, showing you what has been marked as Exhibits 4-A through N respectively, would you please examine those exhibits?—Judge, with regard to Exhibits 4-A through N, are there

any articles or other matters in there referring to the matter that is now pending here, State of Nebraska versus Erwin Charles Simants? A. Yes.

Q. And are those matters fairly representative of the publicity which you were aware of on October 21st, 1975? A. I'd have to look at the rest of these. I put one pile on my left that I personally read, that I have read. These on my right I haven't read yet.

Q. Were you aware on October 21st, 1975, that the matter of the State of Nebraska versus Erwin Charles Simants was drawing attention from the press on a statewide basis?

Mr. Kay: To which we object as incompetent, irrelevant, immaterial, calling for a conclusion of the witness; no proper foundation.

The Court: Overruled.

54 A. Yes.

Q. (By Mr. Vyhnaelek) And were you aware on October 21st, 1975, that the matter of the State of Nebraska versus Erwin Charles Simants was attracting national attention from members of the press? A. Yes.

Q. And, in looking over Exhibits 4-A through N, would you say that those articles that are contained therein with regard to this matter, State of Nebraska versus Erwin Charles Simants, are representatives of the publicity that you were aware of on the 21st of October, 1975? A. May I look at the rest of the articles first?

Q. Yes.— A. Yes.

Q. Now, we have been discussing the newspapers, you can always get your hand on a newspaper. But, how about radio and television, were you aware of press coverage on this matter? A. Yes.

Q. Had you, yourself, prior to and on October 21st of 1975, been called by members of the various media?

Mr. Kay: To which we object as incompetent, irrelevant, immaterial.

The Court: Overruled.

55 A. Prior to October 21st?

Q. (By Mr. Vyhnaelek) Yes, sir. A. Yes.

Q. And were you also called on October 21st? A. Yes.

Q. And were you called on October 22nd?

Mr. Kay: To which we object as incompetent, irrelevant, immaterial; no proper foundation.

The Court: Overruled.

A. Yes.

Mr. Vyhnaelek: At this time we would offer Exhibits 4-A through N as being the articles contained in those exhibits referring to the matter of State of Nebraska versus Erwin Charles Simants, which in this case is docketed as B-2903, is that right?

The Court: B-2904.

Mr. Vyhnaelek: B-2904—to show that this is the publicity surrounding the matter, at least up until and including the date of the last paper.

Mr. Kay: I would like to ask the witness some questions on voir dire?

The Court: You may.

Mr. Kay: May I approach the witness?

The Court: You may.

56

# Cross Examination

By Mr. Kay:

Q. We have Exhibits, as I understand it, 4-A through 4-N, is that correct? A. Yes. That's what we're referring to. I didn't pay any attention to the exhibit markings, but I believe that is correct.

Q. Now, are you at this time aware of or prior to this time were you aware of all of those exhibits? A. No.

Q. Would you please look at the exhibits and tell us which ones, pick out which ones you weren't aware of. A. I was not aware of?

Q. Yes. A. Four-N.

Q. You just pick them out and I'll hand them to you.

A. I think I had them in order—.



Q. Now, you have just handed me a number of exhibits. Are these the exhibits that you were not aware of? A. That's correct.

Q. You had never seen them before you came into court here tonight? A. These actual clippings?

Q. Yes. A. No.

Q. Or similar clippings of newspapers. A. Well, maybe similar papers, but not—

Q. I mean these specific articles. A. No, no.

Q. All right. So we can straighten the record out, you're referring to 4-E,— A. That's correct.

Q. And you're referring to 4-I. A. That's correct.

Q. And you're referring to 4-F. A. That's correct.

Q. And you're referring to 4-G. A. That's correct.

Q. And you're referring to 4-L. A. That's correct.

Q. And you're referring to 4-N. A. That's correct.

Q. Four-N, of course, is a copy of the Denver Post, is it not? A. Yes, it is.

Q. I'll set these aside. Now, do I understand you, Judge, that when you entered this order on October 21st, 1975, that you based this order partially on what you read in the newspapers and heard on the TV and heard on the radio? A. "Partially" would be a fair statement.

Q. Yes. And at this particular hearing was there any evidence presented? A. At what particular hearing?

Q. At the hearing on the motion to enter the gag order. A. In open court there was no evidence presented, other than statements by counsel.

Q. Yes. Were there any exhibits offered? A. No.

Q. Okay. Now, you say that you entered that on the 21st. Of course, Exhibit 4-J, as I understand it, we stipulated to this, that that is an article from the October 21st issue of the Omaha World-Herald, is that correct? A. I've seen an article similar to this in the World-Herald. I can't say that this is the exact one and I don't see, can't say what date this is. I can't see a date on here.

Q. Did you read that particular article—not this particular exhibit?

Mr. Vyhnalesk: Your Honor, I object on the grounds that there is no proper and sufficient foundation. The articles are only being offered to show the amount of publicity and that the judge was aware of the publicity at the time of the entry of the order and now. They are not offered for the purposes of each and every specific article. In other words, it's not, as I pointed out earlier, the judge in a matter such as this has a duty to come forward perhaps spontaneously with an order of this type in one fashion or another, and it can't be expected that anyone has read every newspaper article, heard every radio broadcast, saw every TV program before he makes a decision such as this. He must be aware, and that's the only thing, that such publicity was around. And that's why that is offered.

The Court: I agree with you, Mr. Vyhnalesk. But I do think that Mr. Kay has got a right to find out what articles Judge Ruff has read.

(Thereupon, the last-pending question was read by the Reporter, to-wit: "Question: Did you read that particular article—not this particular exhibit?")

A. To the best of my knowledge, I can't really remember what day. It looks familiar, it looks like I've read it.

Q. (By Mr. Kay) Prior to the time that you entered your order on October 21, 1975? A. That I really can't tell you.

Q. So, you can't say really whether you based your opinion partially on Exhibit 4-J or not then. A. That is correct.

Q. Now, I am handing you what has been identified as Exhibit 4-K, which is an issue, I believe, October 20th issue of the Kansas City Times. When did you read that exhibit? A. The afternoon of Monday, October 20th.

Q. The same date the paper was issued? A. That's correct.

Q. And where did you get that exhibit? A. From Judge Byrnes.

Q. Do you know where he got it? A. I believe—

Mr. Vyhnalesk: Object to that, Your Honor, I think it's completely irrelevant.

The Court: Sustained.

Q. (By Mr. Kay) Well, is the Kansas City Times circulated in North Platte, Nebraska?

61 Mr. Vyhnalesk: Object to that—well, go ahead and answer it.

A. I really don't know.

Q. (By Mr. Kay) Now, you have handed me Exhibit No. 4-H, and tell me whether you read that prior to the hearing? A. I didn't.

Q. Well, that was in the stack that you gave me, so, we'll put that over in the other stack. A. If your question is prior to the hearing, that would have to go to the other stack, if that's going to be your—

Q. In other words, you didn't base your order on Exhibit 4-H. A. No.

Q. You couldn't have because Exhibit 4-H was published after the hearing. A. That's right.

Q. Now, here's Exhibit 4-D, will you tell us what that has to do with this case, really? A. Not much.

Q. Is it detrimental in any way

Mr. Vyhnalesk: I object to that, Your Honor.

The Court: Let him finish his question.

Mr. Kay: I'll withdraw the question, Your Honor.

62 The Court: Very well.

Q. (By Mr. Kay) Did you take that particular exhibit into consideration in entering your order on October 21st, 1975? A. No.

Q. So, we'll put that in the other stack, is this right? A. If that's what you want to do with it.

Q. Well, I mean, is that true, I mean, you didn't consider that? A. No, no-way did I consider that.

Q. Now, we're down here to Exhibit 4-A, which is the issue of—what is the date on that newspaper? A. The 23rd.

Q. And what was the date of that hearing? A. The hearing on the motion was on the 21st.

Q. So, you didn't— A. No, I did not.

Q. So, put that over in this stack. Now, here's Exhibit 4-M. What is that? A. October 20th.

Q. Nineteen seventy-five? A. Yes.

Q. That's an issue of the North Platte Telegraph? A. That's correct.

63 Q. Did you read that prior to the hearing on October 21st, 1975? A. Yes, I did.

Q. And did you take that into consideration when you entered that order on the evening of October 21st, 1975? A. I can't say specifically, but I'm sure—

Q. Well, did you read it or did you know it prior to the hearing, that's all I'm asking? A. Yes, I did. I'm sure that would have to be part of the consideration.

Q. Now, I'm handing you 4-B. Would you look at that? A. That's the same exhibit.

Q. So, we really can't count that twice, can we? It's the same thing.

Mr. Vyhnalesk: I agree that counsel has a right to cross examine, but I think that's going somewhat without the scope of the hearing.

The Court: Sustained.

Q. (By Mr. Kay) Are they the same thing? A. Yes, they are the same thing.

Q. I am handing you Exhibit No. 4-C, ask you what that is? A. That is an article from the North Platte Telegraph.

64 Q. What date? A. I don't know.

Q. I think we have stipulated, and there's a mark there— A. Oh, the 21st.

Q. Is that the same day you entered your order, isn't that correct? A. Yes, it is.

Q. And did you read that article prior to the hearing?  
A. Yes, I did.

Q. And did you base your opinion partially on that exhibit? A. I would guess, yes. Partially, again, the question is "partially," yes, partially.

Q. So, of all these exhibits here you're saying that you read Exhibits 4-C, 4-J, 4-K, and 4-M, four exhibits, you read those prior to the time that you entered the order.  
A. That's correct.

Q. And you based your opinion partially on those exhibits. A. Partially.

Mr. Kay: Okay. We have no objection to the  
65 offer.

The Court: Exhibits Nos. 4-A to 4-N, inclusive, are admitted in evidence as they are material. Of course, there are parts of the exhibits that have nothing to do with this case. They are admitted only for their relevant portions thereof.

#### Re-Direct Examination

By Mr. Vyhnalesk:

Q. Your Honor, in addition to Exhibits 4-A through N were you generally aware of publicity other than newspapers? A. Yes.

Q. And that included radio and TV. A. Yes.

Q. And also included conversations, did it, around the courthouse and in the North Platte community? A. Conversation around the courthouse was the main criteria.

Mr. Vyhnalesk: Your witness.

The Court: You may inquire, Mr. Kay.

66

#### Re-Cross Examination

By Mr. Kay:

Q. I may have asked you one or two of these questions, but, as I understand it, there was no evidence given at

the hearing on October 21st, 1975. A. At the hearing in the courtroom, that's correct.

Q. And at anytime did you give any notice to anybody, to any of the news media, that there would be a motion filed and that there would be a hearing on the motion prior to the hearing on the motion?

Mr. Vyhnalesk: To which we object as being incompetent, irrelevant, immaterial, and doesn't tend to serve any purpose in this inquiry.

The Court: Overruled.

A. No, I did not.

Q. (By Mr. Kay) And you were aware of the fact, of course, at about 7:30 p.m. that the media was represented by legal counsel, were you not? A. Yes.

Q. And, as I understand it, there was absolutely no evidence offered at the hearing. A. At the hearing, that's right.

Q. And you based your findings in your order solely upon what you had read in the newspapers, and  
67 what you had seen on TV, and what you had heard on the radio and statements of counsel. A. Primarily statements of counsel.

Q. Which were not of record. A. Which were not of record, that's correct.

Mr. Vyhnalesk: I would move to strike that, Your Honor, on the grounds that because of the nature of this matter that can be prejudicial.

The Court: I'm not sure that I understand you, Mr. Vyhnalesk.

Mr. Vyhnalesk: Well, okay, I'll withdraw it, Judge.

The Court: All right.

Q. (By Mr. Kay) This order you entered, it was your intent to make a blanket order on all the testimony at the preliminary hearing, a gag order on all the testimony offered at the preliminary hearing. A. At the time the order was signed?

Q. Yes. A. That is correct.



Q. So, there was a prior restraint as to what would be disseminated at the hearing.

Mr. Vyhnalesk: I'll object to that as calling for a conclusion, incompetent, irrelevant, immaterial, without  
68 the scope of the inquiry, and invades the province of the Court in the inquiry of this matter.

The Court: Sustained.

Q. (By Mr. Kay) Did I call you on the morning of October 22, 1975, prior to the preliminary hearing and ask you for time to discuss this order with you as counsel for the news media? A. You did.

Q. And what did you tell me, Your Honor? A. I said —You called around, I believe, just shortly before 9 a.m. and I said that I would grant you that time and we would meet at 9:30.

Q. Yes. And then did you call me thereafter? A. Approximately five minutes, maybe 10 minutes later.

Q. And what did you tell me at that time? A. I don't remember the exact words, but I'm sure at that time I informed you there were vehement objections by opposing counsel.

Q. Now, are you referring to whom? A. The county attorney's office and the public defender's office.

Q. And what were they objecting to? A. You standing.

Q. And what did you tell me?

69 Mr. Vyhnalesk: I fail to see the relevancy of this, Judge, because the record has already established that Mr. Kay was present at that hearing.

The Court: Overruled.

A. I don't quite——

Q. (By Mr. Kay) I'm referring about the time. You first told me, isn't this correct, that the thing would be conducted at 9:30. A. Until 9:30, that's correct.

Q. Is that correct? A. That's correct.

Q. And then you called me back and what did you tell me? A. That it would not be.

Q. And why? A. Because of the vehement objections of opposing counsel, and they informed the Court that the defendant was in the courtroom, that the press had no standing, that the preliminary hearing was set for 9 o'clock and that it should go-off at 9 o'clock.

Q. So, in effect you took their word that the press had no standing. A. That is correct.

Mr. Kay: That's all.

70 Mr. Vyhnalesk: Judge Ruff,——

The Court: Just a minute. Mr. Larson, you may inquire.

### Cross Examination

By Mr. Larson:

Q. You made no independent determination as to whether or not in your opinion there was standing or whether the criminal process should be delayed? A. I had to make a determination. My determination was, from everything that was being submitted to the Court, without any authority, that they had no standing and that the preliminary hearing should go-off.

Q. Were you advised as to the fact that all witnesses were present in court? A. Yes, I was.

Q. Both sides were ready to go? A. That's right. ——

The Court: Just a minute. Are you finished, Mr. Larson?

Mr. Larson: That's okay, yeah.

The Court: Have you finished?

Mr. Larson: Yes, Your Honor.

71 The Court: Mr. Vyhnalesk, you may inquire.

### Further Re-Direct Examination

By Mr. Vyhnalesk:

Q. Judge Ruff, on the morning of 22, October, 1975, were you aware that pursuant to the statutes of the State of Nebraska the defendant had a right to a preliminary hearing within four days?

Mr. Kay: To which we will object as invading the province of the Court. The Court knows what the law is.

Mr. Vyhnaelek: All I'm asking is whether he was aware of it.

The Court: I presume that the Judge knows the law. The objection is sustained.

Mr. Vyhnaelek: Your Honor, what I'm trying to show here is that on the morning of October 22nd the representatives of the press attempted to delay the preliminary hearing which this man is entitled to within four days under Nebraska Statute in order to present their matters as they are today. And you can see the time that we've spent on this.

72 The Court: I appreciate that, Mr. Vyhnaelek, but I still assume that Judge Ruff knows the law. The objection is sustained.

Mr. Vyhnaelek: I have nothing further.

#### Further Re-Cross Examination

By Mr. Kay:

Q. Would you say your stand was that you wouldn't give counsel for the press 30 minutes?

Mr. Vyhnaelek: I object to that.

The Court: The objection is sustained. I think it tends to be argumentative.

Mr. Kay: That's all.

The Court: Mr. Larson?

#### Further Re-Cross Examination

By Mr. Larson:

Q. What was the nature of the statements given by counsel at the hearing?

Mr. Kay: To which we object as incompetent, irrelevant, immaterial.

The Court: Overruled.

A. Would you repeat the question? I didn't understand it.

Q. (By Mr. Larson) What was the nature of the  
73 statements given by counsel at the hearing on the evening of October 21st, 1975? A. By counsel?

Q. On behalf of the State and on behalf of defense counsel. Much has been made of the fact that you had no evidence before you. A. Oh, the statements, the statement by the county attorney laid background information as to the news media releases, went through some of it, referred to television reports, radio reports and newspaper reports. I believe Mr. Vyhnaelek joined in that.

Mr. Larson: That's all.

The Court: I think we're finished. You may step down.

Mr. Kay: I would like to—

The Court: You want to ask one more question?

#### Further Re-Cross Examination

By Mr. Kay:

Q. I would like to know the statement that counsel for the media said? A. For the media?

Q. Yes. A. Quite a few statements. I'm trying to  
74 remember the salient ones. You brought it to the attention of the Court that the fact that judicial proceedings in Nebraska were open to the public.

Q. Any other, had any other counsel brought that fact to your attention in their statements? A. That particular statute, no. You also brought it to the attention of the Court the concern of the news media.

Q. For a fair trial? A. Pardon? For a fair trial, that's correct, and made certain offers on behalf of the news media in connection with a fair trial.

Q. Generally we resisted the motions, did we not? A. Yes, you did.

Mr. Kay: That's all.

Mr. Vyhnaelek: Judge Ruff—am I out of turn?

The Court: I think you finished your inquiry of this witness several times.

Mr. Vyhnalesk: There were other questions asked with regard—

The Court: If you would limit your questions strictly to those questions on re-re-cross examination.

75 Mr. Vyhnalesk: Heavens.

The Court: There were only two. That was as to what Mr. Kay said. Mr. Larson inquired as to what the other attorneys said, and Mr. Kay inquired as to what he said.

Mr. Vyhnalesk: We will pass the witness.

The Court: You may step down, sir.

Thank you.

Judge Ruff: Thank you.

Mr. Kay: I have no objection, Your Honor, the witness can be excused. I know he has had a hard day.

The Court: You may be excused. Of course, you're welcome to stay.

Judge Ruff: Thank you, Your Honor.

Mr. Vyhnalesk: Thank you, Judge.

The Court: Call your next witness.

Mr. Vyhnalesk: Rest.

The Court: Mr. Larson, have you witnesses that you desire to call with reference to these two motions by the defendant?

Mr. Larson: No, Your Honor. The State rests.

76 The Court: Mr. Kay, have you witnesses that you desire to call?

Mr. Kay: No, Your Honor.

The Court: Very well. I will now listen to arguments on all three motions. I'm referring now to the motion by the Nebraska Press Association and others, the motion by the defendant to close all pretrial hearings, and the motion by the defendant to continue the county court order for the protection against publicity. I will allow you to argue first, Mr. Kay.

(Thereupon, argument was made by Mr. Kay, Mr. McGill, Mr. Larson and Mr. Vyhnalesk. After which, the following further proceedings were had, to-wit:)

The Court: There is no question in my mind that one of the constitutional guarantees is the right of free press and the right of free speech. There has been a comment here in the argument that this at times conflicts with a fair trial. I recognize this conflict. I do believe that it is possible to maintain both constitutional guarantees simultaneously. It must be done with considerable delicacy and restraint on the part of all parties. And it is for that reason that the Bar-Press Guidelines were adopted.

The requirement of a fair trial is uppermost in the minds of most jurists and lawyers. It recognizes that they may conflict with a free press, but this Court and I think other courts are not willing to sacrifice a fair trial in order to get a free press, and are not willing to go along with Mr. McGill's proposition that it would be even justified to have mistrials in order to guarantee the free press. I do not intend to get us into a mistrial in this case, and feel that we still can have free press in order to accomplish both objectives simultaneously.

I must condemn the past courts that are secret. We have seen many times that secret courts are bad courts. In England you had the Court of the Star Chamber, and in Spain you had the Inquisitions; and these are courts that are to be condemned because they were secret courts and they were bad courts. I think that the court system of the United States is an exemplary system, perhaps the best

78 system in the world. And publicity of the happenings in court is welcomed. The courts are better off as the light of day shines on them, for two reasons, one is that they are good and if the publicity is given, why, it necessarily must show them in a good light, and the other is the mere fact that the light of publicity is shining on them, the courts become better.

Now, with reference to the motions that are before me here: The Court does grant on a temporary basis the third verbal motion that the defendant made, that the county court's order dated October the 22nd, 1975, dealing with a



protective order with respect to pretrial publicity be continued. This is a temporary continuance because of the press of time and because of the lack of background information that this Court has.

I think in all candor that Judge Ruff said that he entered his order with a press of time, and I certainly recognize the press of time that he was working under. Prior to entering that order, I think I'd be less than candid if I did not reveal that he and I discussed it and discussed some of the problems that would accompany such undesirable publicity. I do think that as we look at the order that  
79 the order should be modified. I do propose to modify the order and will issue a modified order on—

Mr. Vyhnalek: Monday is a Court holiday, Judge.

The Court: I appreciate that. On October the 27th at 2 o'clock in the afternoon or before. That is a Court holiday, I am aware of that.

Until that time, until that modified order is published, the order of the county court is adopted by this court as an order of this court and the members of the press are so enjoined.

The exception to this is with reference to reporting the happenings in this court today. There is no limitations upon reporting the happenings in this court today, except as they would conflict with the Bar-Press Guidelines. I refer specifically to statements made by attorneys as to possible statements made by the defendant, and would call the press' attention to the fact that to report such a thing would be in contravention of the Bar-Press Guidelines, and I would call your attention to the fact that the Bar-Press Guidelines were specifically incorporated in Judge Ruff's order.

80 I do feel that there is a clear and present danger.

I think that the clear and present danger is tacitly recognized by the press here when at least one member of their staff indicates that he feels that it would not be possible to get an unbiased jury in Lincoln County.

I think we all must recognize the unusual nature of the charges against the defendant, and the relatively bizarre proceedings leading to those charges, and by that very nature I feel that there is a clear and present danger.

And, it is for that clear and present danger that the Court does at this time extend the county court's order on a temporary basis.

The Court denies the defendant's second oral motion to close all pretrial hearings. And the Court takes under advisement the motion made by the Nebraska Press Association and will render an answer to that motion on or before October the 27th at 2 p.m.

Are there any comments that counsel have to make with reference to the order of the Court? Court is now adjourned.

(Thereupon, at this time, 10:28 o'clock p.m., Court was adjourned.)

81 Thereupon, At this time, 2:52 o'clock p.m., C.S.T. on October 27th, 1975, all counsel appearing as hereinbefore set forth, and the defendant appearing in person, the following further proceedings were had, to-wit:

The Court: Since last Thursday there has been an application by the Nebraska Professional Chapter of the Society of Professional Journalists, known as Sigma Delta Chi, to join in the pleadings previously filed by the Nebraska Press Association, et al. Sigma Delta Chi is so allowed to join.

Mr. Vyhnalek: If it pleases Your Honor, may I note my particular objection to this particular intervener. I don't believe I did the other night. We would object to their intervention on the grounds that we asserted against the intervention originally, and also would object on the further grounds that in their application they do not set forth standing in and of themselves as to whether or not they are an unincorporated association, an association, cor-

poration or whatever, to intervene in this matter, and, therefore, have no legal standing.

The Court: The objection is noted. The objection is overruled, and Sigma Delta Chi is allowed to join in  
82 a pleading previously filed by the Nebraska Press Association and others.

At the conclusion of the hearing on last Thursday I announced that because of the press of time I would adopt the order of the court entered by the Lincoln County Court on October the 22nd. I have now given consideration to the order of the Court, and it is my opinion that the order of the Court as entered in this case is too broad.

In modifying the order of the Court I want to give my grateful acknowledgement to the attorneys for their help in finding the truth and the correct order. I appreciate the wide divergence of opinion of the various attorneys, and recognize that this order is unacceptable to all of the attorneys involved; and that the three different sets of attorneys, those representing the Nebraska Press Association, those representing the State, and those representing the defendant, have each expressed strong objections to the order as it is entered. In spite of those strong objections voiced by each of them, I do still thank them for their professional attitude and for the assistance they have given me in attempting to avoid gross error.

83 The Court will reduce its order to writing as soon as practically possible. The order of the Court is that on this 27th day of October, 1975, the same being one of the regular days of the September, 1975 Term of the District Court in and for Lincoln County, Nebraska, the above-entitled case comes on for determination of the defendant's motion for a continuation of the Lincoln County Court's order with respect to pretrial publicity.

The Court, being duly informed, finds because of the nature of the crimes charged in the Complaint that there is a clear and present danger that pretrial publicity could impinge upon the defendant's right to a fair trial, and that

an order setting forth the limitations of pretrial publicity is appropriate, and an order for the news media and public's accommodation to physical facilities is appropriate.

It is therefore ordered that the order of the Lincoln County Court which was adopted by this Court on October 23, 1975, is hereby terminated.

The Court further orders that pretrial publicity shall be in accordance with the following order:

The standards set forth in the Nebraska Bar-  
84 Press Guidelines for Disclosing and Reporting of Information Relating to Imminent or Pending Criminal Litigation are approved and are hereby adopted as the Court Order for dissemination of information in this case; that a copy of such guidelines is attached hereto and by this reference made a part hereof. Such guidelines should be clarified as follows:

First: It is hereby stated the trial of the case commences when a jury is impaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing, is "pretrial" publicity.

Second: It would appear that defendant has made a statement or confession to law enforcement officials, and it is inappropriate to report the existence of such statement or the contents of it.

Third: It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported.

85 Fourth: The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at the careful discretion of the press. The testimony of this witness dealing with technical sub-

jects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.

Fifth: The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported.

Sixth: The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pretrial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply, will not be reported.

In keeping with the physical facilities of the  
86 Lincoln County Courthouse, the Court orders the following:

First: No photographs will be taken on the third or fourth floors of the Lincoln County Courthouse at any time during the conduct of this case.

Second: The main hall on the third floor of the Lincoln County Courthouse will be cleared of all personnel while the jury is moving in or out of the courtroom. When the jury is excused during the conduct of the case, all counsel, news media personnel, spectators, or other persons present in the courtroom will remain seated until the jury has left the courtroom and cleared the main third floor hallway.

This order will remain in effect until further order of the Court or until completion of this case.

The Order will be reduced to writing and will be signed by the Court as soon as physically possible.

Is there anything else to be brought before the Court on this case? Court is adjourned.

Mr. Vyhnalek: I'm sorry, Your Honor.

The Court: Go ahead, Mr. Vyhnalek.

87 Mr. Vyhnalek: Your Honor, in line with this order, we would at this point make our motion a continuing motion with regard to the closing of any and all pre-trial reporting of facts or the surrounding circumstances of this case as we anticipate the filing of motions and make that motion in anticipation of those filings.

The Court: I do understand the continuing nature of your motion, and the Court has refused and does now refuse to grant the motion. Court is adjourned.



**Exhibit 2**

Filed Oct. 19, 1975—Ronald A. Ruff, County Judge

**CRIMINAL DOCKET**

STATE OF NEBRASKA

VS.

ERWIN CHARLES SIMANTS

**JUDGE'S MINUTES**

10-19-75—Defendant appears in Court for arraignment. The complaints are read, and the defendant's rights are given, and the Statute is read. Public Defender is appointed to represent the defendant, Marvin Holscher and Milton Larson appear for the State, Leonard Vyhnaelek and Keith Bystrom appear for the defendant as Public Defenders.

Evidence is taken from the County Attorney for the purposes of setting bond. Leonard Vyhnaelek objects to the setting of a bond at this time and clearing of spectators from the courtroom for the purposes of taking evidence. Both objections are overruled.

Evidence is submitted by Marvin Holscher, Chief Deputy County Attorney.

The Court finds that presumption is great that the defendant has committed the crime of murder.

IT IS THEREFORE ORDERED that the defendant, ERWIN CHARLES SIMANTS, be held without bond pending further action in this Court.

\*Preliminary hearing is set for Wednesday, October 22nd, 1975, at 9:00 a.m.

/s/ RONALD A. RUFF  
Ronald A. Ruff, County Judge

10-21-75—Motion filed by County Attorney to restrict news media coverage on the preliminary hearing. Present in the courtroom are Leonard Vyhnaelek and Keith Bystrom for the defense, the defendant, Erwin Charles Simants; Milton Larson, County Attorney, and Marvin Holscher, Deputy County Attorney. Harold Kay appears on behalf of the news media. Defense orally joined in the motion made by the prosecution and further moved that the hearing be closed entirely to the public. The Court overrules the portion of defense motion that pertains to closing to the public. Defense moves for sequestration of witnesses. Motion sustained. State moves for sequestering of witnesses. Motion sustained. Arguments are given by Harold Kay for the media, Leonard Vyhnaelek for the defense, and Milton Larson for the County Attorney concerning the motion for restrictive order. The Court takes the motion under advisement.

10-21-75—After due consideration of the arguments submitted to the Court on the motion for restrictive order, the Court finds the motion is well taken and it is hereby granted.

Restrictive order to be filed in the Erwin Charles Simants file.

/s/ RONALD A. RUFF

10-22-75—A preliminary hearing is held. Milton Larson, Marvin Holscher, John Murphy, and John Thomas appear as attorneys for the State of Nebraska. Leonard Vyhnaelek and Keith Bystrom appear as attorneys for the defendant. Defendant appears in Court. The following witnesses are placed under oath and testify: Dr. Miles Foster, Herbert Miesner, James Boggs, Amos Simants, June M. Lindstrom, James Burnett, Dan Reece, Terry B. Livengood, and Sheriff Gordon D. Gilster. At conclusion of the testimony submitted to the Court, the Court finds that beyond any

reasonable doubt the following crimes have been committed: Murder in the First Degree of Henry Kellie; Murder in the First Degree of Audrey Marie Kellie; Murder in the First Degree of David Kellie; Murder in the First Degree of Daniel Kellie; Murder in the First Degree of Deanne Kellie; and Murder in the First Degree of Florence Kellie.

IT IS FURTHER THE JUDGMENT OF THIS COURT that there is probable cause that ERWIN CHARLES SIMANTS has committed these crimes.

IT IS THEREFORE ORDERED that ERWIN CHARLES SIMANTS be bound over to the District Court of Lincoln County, Nebraska, to stand trial on six (6) counts of First Degree Murder.

Bail is denied.

/s/ RONALD A. RUFF  
Ronald A. Ruff, County Judge

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SEE NO 1

# A subservient right is no right at all

"I, for one, have great difficulty in understanding why, after 175 years of reasonably successful administration of criminal justice, we suddenly find that the tried and tested remedies for assuring a fair trial are inadequate. I find it difficult to understand why the only choice we have is to sacrifice one constitutional right to preserve another." — Judge Frank W. Wilson, United States District Court of Chattanooga, Tenn., in a speech at the University of Chattanooga Aug. 22, 1967.

"When the two rights come in conflict, the right of a free press must be subservient to the right of due process." — Lincoln County Court Judge Ronald Ruff, North Platte, Oct. 22, 1975.

The free press-fair trial controversy which has occupied the attention of newsmen and courts and attorneys in an endless dialogue over the past decade or so has visited itself upon North Platte and Lincoln County. We did not ask for it. We do not enjoy it. We would just as soon it would go away. But it won't.

Pressed by attorneys for the defendant to close a preliminary hearing to the press and public, and pressed by attorneys for the state to restrict reporting on at least part of the hearing, Judge Ronald Ruff ruled that the hearing should be open but that none of the testimony could be reported. He expected no-one to be satisfied, and no-one was.

We can sympathize with Judge Ruff. He was caught in the center of a dilemma which cannot be resolved except by imagining that some parts of the Bill of Rights are less important than other parts. If any court, at any given moment, can choose to ignore or make subservient one part of the Constitution, it seems to the untrained layman, at least, that all parts become very weak guarantees.

It also seems to this untrained layman that the legal profession has manufactured this dilemma. Out of good intentions, no doubt, and with the help of some occasional bad judgment and bad reporting on the part of the press. But it is manufactured, nevertheless, and unnecessarily so.

Let us cite Judge Wilson again. His speech has no legal standing, of course. But then attorneys for both sides quoted from a textbook more than they quoted cases to support their cause in a hearing on this subject Tuesday. So perhaps we may be permitted this license.

"Certain it is that the press coverage of crimes and criminal proceedings makes more difficult the job that a judge has of assuring a fair trial. But no one has yet shown that it renders the job impossible. In fact, no one has yet shown, to the satisfaction of any court, an identifiable instance of miscarriage of justice due to press coverage of a trial where the error was not remedied. So remedies short of curtailing freedom of the press do exist!"

To this untrained layman, it seems the root of the matter is that the members of the legal profession somewhere along the line lost faith in the jury system. More specifically, the bar abandoned the notion that jurors properly instructed might be able to decide a case fairly and objectively on the evidence presented in court, even though they

might previously have read or heard some other information.

Not all jurors can, of course. There is machinery for eliminating in advance those potential jurors who seem unlikely to set aside their previous opinions and prejudices. But somehow the bar has developed a mental attitude which presupposes any potential juror who has read any prejudicial information has that frozen in his mind and will be forever unable to turn loose of it. From that assumption have come arguments and decisions that would be ludicrous if the matters at stake were not so serious.

It is a complete reversal. In the early days of trial by jury, an attempt was made to find jurors who already knew something about the case, on the theory they would be best qualified to evaluate the evidence and arguments. We would not suggest going back to that premise. But we would suggest that attorneys and courts who pursue too vigorously the notion that jurors with any prior information are hopelessly contaminated may succeed in destroying the jury system along with the free press tradition.

Judge Ruff believed that he had no choice but to restrict the press in order to do his duty in protecting the defendant's right to a fair trial. The press of Nebraska disputes that, and the reader may wonder why. Many preliminary hearings are not covered in detail. In many others, the press voluntarily refrains from reporting segments which would be prejudicial, sometimes of its own volition and sometimes at the request of judge or attorneys. But when any court lays down a rule that may become precedent, and thus may have the effect of law, the press has an obligation to oppose such restriction.

Let us cite Judge Wilson again:

"...the participants should always bear in mind that freedom of the press is the right of the public to know....No publisher or group of publishers and no member of the bar or bar association has the prerogative to bargain away the public's right to know."

And again:

"I cannot see why this nation need be called upon to sacrifice the First Amendment upon the altar of the Sixth, nor the reverse thereof."

"I know of no greater bulwark to the preservation of fair trials than the continuation of a free press. I cannot think of any greater deterrent to the maladministration of justice than to open every single judicial proceeding to the most complete exposure to those who desire to report the facts of what is happening in the courtroom. The public is entitled to know not only that our courts are administering justice, but also how they administer justice."

And once more from Judge Wilson, who obviously is in a minority among his associates:

"In the heat of controversy what is oftentimes needed is a faith in principles, not a hasty change in the rules. Those who would curtail freedom of the press in the name of assuring a fair trial do a disservice to both. We may draw a lesson from this controversy for living in these controversial times. It is that freedom of the press, like all freedoms, is never won. Rather, like all freedoms, it is always only in the process of being won."

## NORTH PLATTE TELEGRAPH

An Independent Newspaper, Founded April 14, 1881



James W. Kirkman, Publisher

Keith Blackledge  
Editor and Director  
of Public Affairs

Donald E. Wing  
General Manager

Published by Western Publishing Co.  
James C. Seacrest, President

Editorial, Opinion and Feature Page

4 Thursday, October 23, 1975



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SEE NO \_\_\_\_

2, 3, 4,

EXHIBIT NO. 4-D

Newspaper Clipping

North Platte Telegraph, October 21, 1975

Chesapeake, Va.; seven grand-  
and two great-grandchildren.

**Kellie Family**

SUTHERLAND — Combined services  
for James Henery Kellie, 66; Audrey M.  
Kellie, 57; David L. Kellie, 32; Deanna  
Lynn Kellie, 7; Daniel L. Kellie, 5; and  
Florence Marie Kellie, 10; who died  
Saturday night, will be Wednesday at 2  
p.m. at the Sutherland High School gym-  
nasium.

Officiating at the services will be the  
Rev. Verneeda Brown of the Wesleyan  
Church of Arthur and the Rev. Nels  
Ibsen of the Wesleyan Church of  
Sutherland.

Burial will be in Sutherland Cemetery  
with Ryan and Tickle and Adams and  
Swanson Funeral Homes of North Platte  
in charge of services.

The bodies are lying in state at the  
Ryan and Tickle Funeral Home. The  
caskets will not be open.

Memorials have been established.

## Newspaper Clipping

Omaha World-Herald, October 23, 1975

# Sexual Assault Charges<sup>W N</sup> 9/23 Added in Simants' Case

From World-Herald Press Services.

North Platte, Neb. — Erwin Charles Simants was ordered Wednesday to stand trial on charges of murder and sexual assault after a preliminary hearing in which news coverage of testimony was barred by order of Lincoln County Judge Ronald Ruff.

Omaha attorney Stephen McGill and North Platte attorney Harold Kay were scheduled to seek an order from Lincoln County District Court at 1:30 p.m. today to overturn the gag order. The attorneys have been retained by various news organizations.

Simants was arrested Sunday and charged with six counts of murder in connection with the

fatal shooting Saturday of six members of the Henery Kellie family of Sutherland, Neb.

After reviewing autopsy reports, Lincoln County Atty. Milton Larson filed an amended complaint Wednesday at the opening of Simants' preliminary hearing. The amended complaint added to each of the six counts that the murders may have been committed "in the perpetration of a sexual assault in the first degree."

First-degree sexual assault was defined in LB 23 passed by the 1975 Legislature. The bill, the first revision of Nebraska's rape statutes in 100 years, replaced the word "rape" in the law with two degrees of sexual assault.

First-degree sexual assault is defined in the law as "sexual penetration" of the victim.

Simants is accused of fatally shooting Henery Kellie, 66; his wife, Marie, 57; their son, David, 32; David's two children, Daniel, 5, and Deanne, 6; and the elder Kellie's granddaughter, Florence, 10.

The hearing for Simants was held as joint funeral services were conducted in the Sutherland High School gymnasium for the victims, the Associated Press reported.

Testifying during the morning session of the four-hour hearing were Dr. Miles Foster, North Platte pathologist who examined the victims' bodies; Herbert Meissner, chairman of the Village Board of Sutherland; June Lindstrom, an ambulance attendant from Sutherland, who was among the first to arrive at the scene after the slayings; James Boggs, 13, Simants' nephew; and Simants' father, Amos.

Simants had been living at the Boggs home in Sutherland, which is next door to the Kellie home where the shootings occurred.

## Kellie Had Loaned Suspect Simants \$50 For Fine

By EDWARD C. NICHOLLS  
The Associated Press

Sutherland — The eldest victim in the shooting death of six persons in this prairie hamlet of 850 persons had loaned the man accused of the murders \$50 to pay a fine for intoxication only 20 days before the murders.

The Rev. Nels Ibsen of the Wesleyan Church in Sutherland said that Henery Kellie, 66, had loaned the money to Erwin Charles Simants, 29, "so he didn't have to lay it out in jail."

The Rev. Mr. Ibsen said only Kellie's closest friends were aware of the loan. He said Simants was repaying the money by repairing a cattle fence for Kellie, who raised only a small

number of cattle.

"Henery was well liked and it was just his nature to help people," the pastor said. "I don't know if he had ever paid anyone's fine before, but he'd shell out money to help in other ways."

The Kellie's attended the Wesleyan Church.

Wednesday, the six victims will be buried following a mass funeral service in the gymnasium of Sutherland High School.

And on Wednesday, Simants, who had been living with his brother-in-law and sister next door to the victims, will be given a preliminary hearing on six counts of first-degree murder which were filed against him

following his capture Sunday morning.

Authorities believe the mass slayings of the elder Kellie, his wife, Marie, 57, their son, David, 32, David's two children, Daniel, 5, and Deanne, 6, and the elder Kellie's granddaughter, Florence, 10, is the worst mass murder ever recorded at one place and time in Nebraska.

In 1968, Charles Starkweather was accused of murdering 10 persons, nine in Nebraska and one in Wyoming, over a period of several days. Starkweather later was convicted and was the last person to die in the electric chair in Nebraska.

Police have yet to reveal any known motive for the slayings,

but Lincoln County Atty. Milton Larson said Monday that Simants has given authorities a statement. Larson declined to reveal any of the contents of the statement.

Following the report of the murders, police urged local residents to bolt their doors and remain indoors while some two dozen lawmen combed the town and surrounding areas for the killer.

All six victims were shot to death inside the tiny frame home of the elder Kellies on the town's northern edge. David and his two children apparently had stopped at the home for dinner, as was their custom, townspeople reported.

Officials have not identified

the murder weapon, but Lincoln County Sheriff Gordon "Hop" Gilster said a .22-caliber automatic rifle was recovered near the house.

Simants was captured Sunday outside the home of his brother-in-law, Charles Boggs. He had spent the night wandering around not far from the house and, police said, he told them he had had one beer in each of the town's two taverns Saturday night shortly after the murders.

Gilster said Simants had a record of arrests on minor matters, many of them involving drinking, but had never before been arrested on any serious charge. Gilster said Simants had spent most of Saturday in the Rodeo Bar in Sutherland.

An unidentified relative said Monday that Simants was not, as officials had believed, a bachelor. The relative said Simants had been married and was either divorced or separated following the death of a child he had fathered.

Conviction of first degree murder is punishable in Nebraska by death in the electric chair or life imprisonment.

EXHIBIT NO. 4-F

Newspaper Clipping  
Lincoln Star, 10/21/75



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SEE NO \_\_\_\_\_

# Murder charges amended, judge issues 'gag' order to news media

10/22  
NP Telegraph

By BILL EDDY

Amended charges including possible sexual assault were filed against Erwin Charles Simants Wednesday and the preliminary hearing for him began in Lincoln County Court under apparently unprecedented press restrictions.

The amended charges were filed prior to the start of the hearing by County Attorney Milton Larson. Simants is now charged with six counts of first degree murder while "in the perpetration of or attempt to perpetrate a sexual assault."

The complaint does not specify against which person or persons the alleged sexual assault was attempted or committed.

Simants is facing the charges in connection with the deaths of six members of the Henry Kellie family Saturday night in Sutherland. The dead include Mr. and Mrs. Kellie, their son David and their three grandchildren, Florence, 10, Deanna, 7 and Daniel, 6.

Five witnesses were called to testify during the two-hour morning session of the hearing: Dr. Miles Foster, a North Platte pathologist; Mrs. June Lindstrom, emergency medical technician for the Sutherland ambulance; Herb Meissner, Sutherland mayor and a friend of the Kellies; James Robert (Butch) Boggs, 13, nephew of the defendant and neighbor to the Henry Kellies; and Amos Simants, father of the accused.

However, under an order issued by Judge Ronald Ruff, testimony of the witnesses can not be reported.

The order by Ruff was called unprecedented and a violation of both the word and spirit of Nebraska Bar-Press Guidelines by Joe R. Seacrest, a spokesman for Media of Nebraska. Media of Nebraska is a group representing both daily and weekly newspapers in the state, plus broadcasters.

Seacrest, editor of the Lincoln Jour-

nal, has for several years been active in formulation of the bar-press guidelines, adopted in 1970.

Attorneys for the press group were considering possible legal action to have the restrictive coverage order lifted or amended. But no formal action had been started at noon Wednesday.

Meanwhile, reporters were allowed to attend the hearing and to take notes, but none of the testimony could be reported. Press group attorneys did interpret the order, however, to mean that names of the witnesses could be reported.

Ruff issued his order prior to the start of the preliminary hearing. And he called it "probably the toughest decision I've had to make in my young life."

He said that in considering a motion by Larson to restrict the coverage, he weighed the rights of the public to know what happens in court against the rights of the defendant to "due process."

"When these rights come into conflict, then the right of free press must be subservient to the right of due process," Ruff said.

He said that should the preliminary hearing be reported in detail, "There is a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury in the event that the defendant is bound over to the District Court for trial."

Besides the press, all other persons in the courtroom were prohibited from releasing "for public dissemination . . . any testimony given or evidence adduced during the preliminary hearing."

Release or publication of any information concerning the case outside the preliminary hearing is to be in accord with the bar-press guidelines, Ruff said.

The order is to remain in effect until modified or rescinded by a higher court, Ruff said.



JUDGE RONALD A. RUFF

The motion by Larson and similar ones by Assistant Public Defender Leonard Vyhnaek were offered during an unusual night court session Tuesday at which both the defendant and 11 representatives of the media were present.

Press representatives had been notified in late afternoon of a "meeting" to be held by Ruff to discuss certain motions to be made in the case. When they arrived, they were surprised to find the court in formal session.

Vyhnaek agreed with Larson's mo-

tion to restrict coverage of the preliminary hearing. He also asked that the hearing be closed to the public.

The Constitution, he said, "in no way mandates that this hearing tomorrow or on any other date be made public."

Harold Kay, an attorney representing the North Platte Telegraph and other media, noted, however, that state law guarantees that all judicial proceedings be open to the public unless specifically prohibited by statute.

Ruff agreed with Kay's stand and refused to close the hearing to the public.

Kay told the judge that the media "do not want in any way" to deny the defendant's right to a fair trial. But he also said the press is concerned about the public's right to know.

Kay said no jurisdiction in Nebraska has ever "applied a gag rule and the press doesn't want a gag rule" in this case.

He said it is already doubtful that an unbiased jury could be found to hear the Simants case in Lincoln County and that a change of venue is almost certain. He said there have been "disclosures by law enforcement officers that would violate" Nebraska bar-press guidelines.

## Names similar

The Erwin Charles Simants charged with six counts of first degree murder should not be confused with Charles Edgar Simants of Maxwell, Lincoln County Atty. Milton Larson reported.

He reported there had been some confusion about the identity of the man charged.

EXHIBIT NO. 4-I

Newspaper Clipping

Omaha World-Herald

October 21, 1975

## Motive Clue May Emerge In Autopsies

By Frank Santiago

As more information emerged about Erwin Charles Simants, the mystery of the accused slayer of six in Sutherland seemed to deepen Monday.

The 29-year-old man was apparently on good terms with Henery Kellie, one of those slain Saturday night, and knew him well enough to borrow money and move a daughter of Kellie's to Colorado.

Herbert Meissner, Sutherland's mayor, said the move was completed a few months ago and was from North Platte to Colorado.

Simants, Meissner said, is believed to have lived in Sutherland about five months, moving from North Platte with his sister, Mrs. William Boggs. He lived in the basement of the Boggs home in Sutherland. The home is next door to the Kellie home.

Also slain were Kellie's wife; David Kellie, 32, their son; David's two children, Daniel, 5,



**Florence Kellie**

and Deanne, 6, and Florence Kellie, 10, a granddaughter of the Henery Kellies.

### \$50 Fine

Earlier, the Rev. Nels Ibsen, pastor of the Wesleyan Church in Sutherland, told the North Platte Telegraph that Henery Kellie had paid a \$50 fine for Simants three years ago after Simants was jailed for drunkenness.

There were reports that Kellie, who was retired, had loaned Simants money and that Simants was repaying the money.

Please turn to Page 4, Col. 3.



Deanna Kellie



Daniel Kellie

## Slayer Loose; Town Lives Through a Night of Fear

By a World-Herald Staff Writer

Sutherland, Neb. — As a bus carrying Sutherland High School Band members back from a football game at Chadron entered town, police officers stopped it. Quickly, they escorted the students through the darkness to their homes.

That was one of many incidents here Saturday night and early Sunday as Sutherland residents lived through a night of fear.

A slayer of six was on the loose. And many of the town's 850 residents found it difficult to sleep.

The streets were mostly deserted except for about two dozen slowly moving patrol cars. Everywhere, the cars probed the darkened streets. Visitors, many of them newsmen, were stopped and asked for identification.

Early in the evening, phone circuits were so busy it was im-

possible to make a call.

In the windows of the homes, curtains were drawn, and lights were burning.

At a downtown cafe, a team of county and state officers sat around a large table eating breakfast and planning a foot-by-foot search of the countryside at daybreak.

Sutherland residents had disappeared from the streets early. A dance at the local American Legion Hall was brought to an end shortly after 9 p.m. when the whispers of the shootings raced through town.

The tense moments were evident at the power plant, where police calls are received. The phone rang constantly with reports of sightings and noises in the night.

One woman who phoned, however, wasn't concerned about a gunman. She wanted to complain about a barking dog.

## Motive Clue May Emerge In Autopsies

Continued from Page 1.

by repairing a fence for Kellie.

A motive in the slaying remains a mystery, Lincoln County Atty. Milton Larson told The World-Herald Monday.

But, he said he had a "theory" and that it might be confirmed when the autopsy report on the victims is completed.

Larson said the report "may reveal the circumstances surrounding the deaths." If the report supports his theory an amended charge would be filed to the six counts of first-degree murder already placed against Simants.

### Theory

Larson declined to discuss his theory, saying it might be "prejudicial" if unconfirmed. But, he said, the amended charge, if filed, may shed light on a motive.

He said the autopsy report may be ready today.

A joint funeral service for the six has been scheduled for 10 a.m. Wednesday in the Sutherland High School gymnasium. The service will begin one hour after Simants' 9 a.m. preliminary hearing in North Platte.

Kellie and his wife, both in their 60s, were described as the "salt of the early people," by Irene Peterson, a sister of Kellie's. "My God, they were the most Christian of the whole family. They were God-fearing, hard-working people," she told United Press International.



Filed Oct. 31, 1975—I. L. Boyle, Clerk District Court

IN THE DISTRICT COURT IN AND FOR LINCOLN COUNTY, NEBRASKA

Case No. B-2904, Docket 71, Page 255

THE STATE OF NEBRASKA, *Plaintiff,*

vs.

ERWIN CHARLES SIMANTS, *Defendant.*

TO: THE STATE OF NEBRASKA, MILTON R. LARSON, COUNTY ATTORNEY FOR LINCOLN COUNTY, NEBRASKA, ERWIN CHARLES SIMANTS, KEITH N. BYSTROM, PUBLIC DEFENDER FOR LINCOLN COUNTY, NEBRASKA and LEONARD P. VYHNALEK, DEPUTY PUBLIC DEFENDER FOR LINCOLN COUNTY, NEBRASKA, His Attorneys:

#### Notice of Appeal

You and each of you are hereby notified that the applicants intend to prosecute an Appeal to the Supreme Court of Nebraska from the Order which was rendered and entered by the Court on October 27, 1975.

NEBRASKA PRESS ASSOCIATION, OMAHA WORLD-HERALD COMPANY, THE JOURNAL-STAR PRINTING CO., WESTERN PUBLISHING CO., NORTH-PLATTE BROADCASTING CO., NEBRASKA BROADCASTERS ASSOCIATION, ASSOCIATED PRESS, UNITED PRESS INTERNATIONAL and THE NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI,

*Applicants*

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SEE NO \_\_\_\_\_

6, 7, 8, 9, 10, 11,

By: /s/ HAROLD W. KAY  
 for MAUPIN, DENT, KAY, SATTERFIELD,  
 GIRARD & SCRITSMIER  
 Post Office Box 926  
 112 North Dewey Street  
 North Platte, Nebraska 69101  
 Telephone No. (308) 532-4466  
 and  
 MCGILL, KOLEY & PARSONAGE, P.C.  
 10050 Regency Circle  
 Omaha, Nebraska 68114  
 Telephone No. (402) 397-9988

*Attorneys for Applicants*

IN THE SUPREME COURT OF NEBRASKA

No. 40471

**Application for Leave to Docket**

THE STATE OF NEBRASKA, ex rel NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTERS ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY; *Relators*,

vs.

THE HONORABLE HUGH STUART, Judge, District Court of Lincoln County, Nebraska, *Respondent*.

Come now the Relators and respectfully request the Court for leave to commence an original action in the nature of a Writ of Mandamus (or any other original action—however designated—authorized by the Constitution and laws of the State of Nebraska and appropriate in these proceedings).

In support of this Application Relators state:

1. That a Petition has been delivered to the Clerk of this Court under even date herewith setting forth the facts and circumstances involved in this proceeding. All of such facts and circumstances are incorporated herein by reference as fully as if the Petition were set forth herein verbatim.

2. That a jurisdictional statement setting forth the basis of the Court's jurisdiction has also been delivered to the Clerk of this Court under even date herewith and such

jurisdictional statement is incorporated herein by reference as fully as if said statement were set forth herein verbatim.

3. That it is necessary to commence this original action in this Court for the reasons set forth in the aforementioned Petition and because:

(a) This action challenges the validity and constitutionality of an order of the District Court of Lincoln County, Nebraska, The Honorable Hugh Stuart presiding, which order was entered on the 27th day of October, 1975 and constitutes a prior restraint upon the right of Freedom of the Press protected by the constitutions of this State and Nation. The irreparable damage being suffered by Relators as the result of the entry of the order justifies the filing of this application.

(b) There is no adequate remedy at law.

(c) There is no adequate remedy in any state court other than this court.

WHEREFORE, Relators petition this Court for leave to file their petition for a Writ of Mandamus or other appropriate relief directing the Respondent to forthwith vacate the order of the District Court of Lincoln County, Nebraska, dated October 27, 1975, imposing a prior restraint upon the press and its publication of pretrial publicity in the case of the State of Nebraska vs. Erwin Charles Simants.

Respectfully submitted,

/s/ STEPHEN T. MCGILL  
Stephen T. McGill  
of MCGILL, KOLEY & PARSONAGE, P.C.  
Suite 217, 10050 Regency Circle  
Omaha, Nebraska 68114  
402-397-9988

*Attorneys for Relators*

STATE OF NEBRASKA  
COUNTY OF DOUGLAS, SS.

STEPHEN T. MCGILL, being first duly sworn, on oath deposes and states that he is one of the attorneys for the Relators herein; that he has read the foregoing Application, knows the contents thereof, and that the statements therein contained are true as he positively believes.

/s/ STEPHEN T. MCGILL  
Stephen T. McGill

Subscribed and sworn to before me this 31 day of October, 1975.

/s/ LOUISE G. ANDERSEN  
Notary Public

General Notary, State of Nebraska, Louise G. Andersen  
My Commission Expires May 22, 1977



## IN THE SUPREME COURT OF NEBRASKA

No. 40471

THE STATE OF NEBRASKA, ex rel NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTERS ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY; *Relators*,

vs.

THE HONORABLE HUGH STUART, Judge, District Court of Lincoln County, Nebraska, *Respondent*.

**Petition**

The petition of the above-named Relators, hereinafter referred to as "Petitioners", applying for a Writ of Mandamus (and included therein a common law Writ of Prohibition, if allowed by this Court in this original action) and for a Stay Order for the purpose of having this court enter an order vacating and holding for naught the order of the District Court in and for Lincoln County, Nebraska, in the case *The State vs. Simants*, No. B-2904, entered October 27, 1975, by the Honorable Hugh Stuart, the Respondent. In support of this petition, Petitioners respectfully show the court as follows:

1. Petitioners in this case are Nebraska newspaper publishers and owners, national newswire service owners, media associations, the owner and operator of a radio station, and the individual Petitioners are employees of said Petitioners, as follows: Kiley Armstrong is a staff member of the Associated Press in Omaha; Edward C. Nicholls is Chief Correspondent for Associated Press in Nebraska; James Hut-

tenmaier is an employee of radio station KODY in North Platte, Nebraska; and William Eddy is a reporter for the NORTH PLATTE TELEGRAPH. The Petitioners are engaged primarily in the business of gathering and reporting, publishing and disseminating local, national and international news, as well as other matters of interest, to their readers or listeners and to the general public in the interest of maintaining an informed citizenry. Your Petitioners have been ordered by the District Court in and for Lincoln County, Nebraska, the Respondent Judge Hugh Stuart presiding, to refrain from publishing a broad spectrum of information much of which was and is a matter of public record related to the case of *State vs. Simants*. The factual background leading up to this order is set out in this petition.

2. On or about October 18, 1975, Henry Kellie, age 66; his wife, Marie, age 57; their son, David, age 32; David's two children, Daniel (5) and Deanne (6); and the elder Kellie's granddaughter, Florence Kay, age 10, were allegedly murdered in the Kellie home at Sutherland, Nebraska, and one or more of the alleged murders were purportedly in connection with the perpetration of or attempt to perpetrate one or more sexual assaults.

3. Thereafter, on or about October 19, 1975, Erwin Charles Simants was arrested by the Lincoln County Sheriff and later charged with six counts of murder in the first degree in conjunction with the perpetration of or attempt to perpetrate one or more sexual assaults, all as is set forth in the complaint and amended complaint filed in the County Court of Lincoln County, Nebraska, copy of which is attached hereto as Exhibit "A".

4. At the arraignment hearing before the County Court, several employees of Petitioners were in attendance. Part of the hearing was conducted openly while part of the hearing was closed by the court to the press and the public.

5. The preliminary hearing was scheduled in the County Court of Lincoln County, Nebraska at 9:00 A.M. on October 22 for a determination as to whether Simants should be bound over to the District Court of Lincoln County, Nebraska, on the charges set forth in the amended complaint. On or about 7:00 P.M. on October 21, the prosecution filed a motion with the County Court requesting that a restrictive order be entered by that court. A copy of that motion is attached hereto as Exhibit "B". Earlier that afternoon the Honorable Ronald A. Ruff, either personally or through his Associate County Judge, Dorothy Kriz, notified various members of the press that he might have something that might be of interest to them that evening and wanted them to come to his court at about 7:30 P.M. When the press arrived with their counsel, Harold W. Kay, at approximately 7:15 P.M. on October 21, they were directed by the County Judge, through the Associate County Judge, to leave the second floor of the Lincoln County Courthouse, where the County Court is located, and go down to the first floor of the courthouse. Included among those who were requested to leave, due, perhaps, to a misunderstanding, was counsel for some of the media currently reporting on the murder case. Thereupon, hearing commenced in the County Court among Judge Ruff, the prosecuting attorney and defense attorney concerning the above-described motion. At or about 7:30 P.M. the defendant was brought to the courtroom and the press and public were allowed to return. At about that time the attorneys for the defense joined in the motion of the prosecution and further made an oral motion requesting that the restrictive order be broadened and that the preliminary hearing be closed to the public and press. Without any evidentiary hearing, but after arguments by counsel for the prosecution, counsel for the defense and counsel for certain of the media, Judge Ruff indicated orally that he would enter an order in response to the motions of the defense and prosecution. The following morning, on October 22, Judge Ruff entered

the order, a copy of which is attached hereto as Exhibit "C", which order, in essence, found that prejudicial publicity "would make difficult, if not impossible, the impaneling of an impartial jury in the event the defendant is bound over to the District Court for trial . . ." and imposed a broad restriction on all attorneys, parties, witnesses, court personnel and all other persons "present in court" during the preliminary hearing from transmitting most of that information to anyone. The order contained additional restrictive provisions apart from the preliminary hearing.

6. That at about 8:30 P.M. on October 22, Harold W. Kay, as attorney for the media, requested a conference or hearing with Judge Ruff for the purpose of discussing modification or vacation of the above-described order but the County Judge indicated he would proceed with the preliminary hearing.

7. On October 22, the preliminary hearing was held, commencing about 9:00 A.M., before Judge Ruff in the County Court of Lincoln County, Nebraska, and at this hearing, which was open to the public and at which employees of the various Petitioners and certain of the above-named individual Petitioners were present, testimony was taken from various witnesses which *inter alia* disclosed much factual information concerning the background for the alleged crimes set forth in the amended complaint copy of which is attached hereto as Exhibit "A". Reporting of much of the testimony given at this open-court hearing is enjoined by order of the District Court of Lincoln County, Nebraska, as hereinafter more fully described. Because publication thereof is so enjoined, further details relating to that testimony are not set forth in this petition. However, your Petitioners are filing various affidavits with this court setting forth the factual information adduced from various witnesses at the public hearing. The facts and statements contained in said affidavits are incorporated herein by reference.

8. In the afternoon of October 23, your Petitioners filed an application with the District Court of Lincoln County, Nebraska, copy of which is attached as Exhibit "D" and is by this reference incorporated herein. Later that afternoon the District Court entertained the aforesaid Application to Intervene in the Simants case and to void the County Court's order as well as the motions by the counsel for defense and prosecution to close all future pretrial proceedings in the District Court and to continue in force the County Judge's order or to impose other restrictive orders. A hearing was held about 8:00 P.M. of the evening of October 23 and an evidentiary hearing was first held on said application of your Petitioners at which time the Petitioners showed *inter alia* that the order of Judge Ruff was entered without any evidentiary hearing. Thereafter, an evidentiary hearing was held on the motions of defense counsel at which time defense counsel undertook, through the testimony of Judge Ruff, to establish an evidentiary basis for the County Court's order. In fact, at this hearing, there was no showing of danger to the administration of justice or to the denial of a fair trial to the defendant, in the event any of the defense motions were not granted. Judge Ruff testified, in effect, that he had read four news articles submitted in evidence and had based his order on his awareness of the widespread publicity in the Simants case and the likelihood of continued public interest in those proceedings. There was no evidence of misconduct of any kind on the part of the press. Your Petitioners have filed a praecipe requesting that the testimony at that hearing be prepared immediately by the court reporter. At the close of the hearing, which included oral argument by all counsel, Judge Stuart granted Petitioners' Motion to Intervene, denied defense counsel's motion to close any pretrial District Court proceedings, adopted as his own on an interim basis the County Court's restrictive order and continued all other motions.

On October 27, after further discussion between Judge Stuart and various counsel in the Judge's chambers, Judge Stuart appeared in open court in the District Court of Lincoln County, in a public session attended by the defendant, counsel, the press and the public and terminated the County Court order. Thereupon the Judge read in open court the order which is the subject matter of this original action to this court. The full order is attached as Exhibit "E" to this petition. This order is of public record and available for inspection by any person in the District Court of Lincoln County, Nebraska. In the order, the District Court purported to find that "because of the nature of the crimes charged in the Complaint [murder and sexual assault] . . . there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial . . ." Based on this purported finding, the Petitioners and each of them:

"THE COURT FURTHER ORDERS that pre-trial publicity shall be in accordance with the following order:

The standards set forth in The Nebraska Bar-Press Guidelines for Disclosing and Reporting of Information Relating to Imminent or Pending Criminal Litigation are approved and are hereby adopted as the Court Order for dissemination of information in this case; that a copy of such guidelines is attached hereto and by this reference made a part hereof. Such guidelines should be clarified as follows:

1. It is hereby stated the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing is "pre-trial" publicity.
2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it.



3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported.

4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at careful discretion of the press. The testimony of this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.

5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported.

6. The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported."

9. The order imposes no restriction on others than those reporting the facts associated with the case and it leaves members of the public and officers of the court, who have been in attendance at the preliminary hearing or at the hearing on October 27, 1975, when Judge Stuart read the order in open court, free to disseminate what they heard

and saw. In effect, this order puts the press, as represented by your Petitioners herein, in an inferior position with respect to their exercise of first amendment rights to the general public or even court officers and personnel who attended these hearings in open court.

10. Most or all of the information detailed in Paragraphs 2 through 6 of the District Court order is information that was either publicly testified to in open court during the preliminary hearing or is contained in documents filed in that court, which are matters of public record in the State of Nebraska and to which any interested citizen may have access even to the present time.

11. To the extent that is possible to determine the practical effect of the District Court's "adoption" of the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation, it would appear that the order converts into a direct prior restraint those voluntary guidelines which, on their face, place all decisions on what and what not to publish within the discretion of the press. The use of the guidelines in the order perverts the spirit and intent of the guidelines since they were never intended to be law thrust upon the press by the bar. Rather, they were to be general guides to aid the press in its day-to-day reporting of criminal matters and to assist law enforcement personnel in disseminating information. Moreover, compliance with the guidelines was intended to be entirely voluntary and the interpretation of the guidelines was left to the press. The language of the guidelines was not designed for inclusion in court orders; rather, the guidelines set forth statements of broad general principle subject to varying interpretations. Including the guidelines in a court order converts them into law, without clear demarcation, to be interpreted by the courts. The incorporation of these vague and indefinite guidelines constitutes an abuse of discretion and may interfere with the relationship of the press, bar,

and the courts and is not in the best interests of the administration of justice in this state.

12. The order of the District Court is to remain in effect for an apparently indefinite period of time. Although no accurate estimate could be made, experience indicates that the trial of the Simants case is at least several months away and could conceivably be delayed for an indefinite period, given the vicissitudes of such litigation. Accordingly, the order will apparently have the effect both of prohibiting the publication of factual information previously testified to in open court or contained in official court documents or public records and of prohibiting similar factual information from being published which may come into public domain in future pretrial proceedings or in documents yet to be filed as a matter of public record in the Simants case. If taken literally, the District Court's order would also appear to operate as a direct restraint on the publication of editorial comment as is the case based upon information received by the press and sources other than open court hearing or public court records.

13. On the 31st day of October, 1975, counsel for your Petitioners attempted to make oral motion to Judge Stuart to stay his order of October 27. Judge Stuart was away from the Lincoln County courthouse and was presiding over judicial proceedings in Ogallala, Nebraska. Upon reaching Judge Stuart in Ogallala, an oral request was made that Judge Stuart stay his said order and the Judge indicated that he did not want to act thereon until Monday, November 3, when he would return to his court in North Platte, Nebraska.

14. At all times since the six deaths occurred as described above, your Petitioners have fairly, responsibly and accurately reported the news relative to this unfortunate incident. Petitioners submit that the circumstances relating to and the manner of the deaths of these six indi-

viduals is and remains of critical importance as a news/press event in terms of interest to the public of this State in that such events have significant effect on any community. Your Petitioners suggest that a responsible and vigorous press, radio and television, reporting and publishing details of such events, results in an informed public and insures the public's right to know. Thereby, the public is able to formulate remedies and proposals for the possible elimination or reduction of the problems which may explain the occurrence of such events. In addition, the performance of various public officials and the capabilities of this State's law enforcement program are directly involved in such incidents.

15. If the lower court is not immediately prohibited and restrained from implementing, executing or enforcing or attempting to implement, execute or enforce the said order, your Petitioners and the public will suffer irreparable harm, both great and immediate, due to the abridgement of Petitioners' freedom of speech, expression and press as guaranteed by the Nebraska Constitution, Article I, § 11 and § 13, and Amendments I, VI and XIV of the Constitution of the United States. Moreover, those who depend upon dissemination of the news by your Petitioners will be deprived of their access to the news arising out of an extremely newsworthy event, including the conduct of various public officials, the administration of general justice in the courts of this State and a significant aspect to the communities' law enforcement program. Although preliminary hearing and pretrial hearings are public events and although that which transpires in a courtroom is public property, the Judge has nevertheless promulgated an order which in its overbreadth will have the effect of prohibiting Petitioners from publishing news arising out of open court proceedings.

16. The order of the District Court is in violation, in addition to Sections 11 and 13 of Article I of the Con-

stitution of the State of Nebraska, to § 24-311 R.R.S. Nebraska, 1943, requiring that all judicial proceedings in this State be open. Denial of expression of publication or the events taking place in open court proceedings, as was done herein by the Lower Courts, is a significant interference with the laws and Constitution of this State requiring open judicial proceedings. Your Petitioners have abided by the respective orders of the County and District courts even though they submit such orders are void on their face. This was done only out of respect for the judicial processes of this State and the Petitioners now seek immediate relief from the order of the District Court to the extent that the order operates as a direct prior restraint on their publication of or editorial comments on the facts of the underlying criminal case and the complaint and other documents attached hereto as exhibits. Petitioners assert that the prohibition on prompt reporting of the news arising out of these public hearings and requiring that such reporting be held in abeyance until the trial, which may be months from now or possibly longer, is just as much a prior restraint, gag and chilling effect as would be an order permanently prohibiting the publication of such news.

17. The Petitioners have no adequate remedy at law.

18. The Petitioners are in immediate danger of irreparable harm by being held in criminal contempt of court for the reason that they seek to promptly report and publish the details of an open court proceeding.

19. Jurisdiction is conferred upon this Court as set forth in the statement filed under even date herewith, the terms and provisions of which statement are incorporated in this petition by reference.

WHEREFORE, your Petitioners pray the Court for an immediate hearing on the validity and constitutionality of the above order of the District Court of Lincoln County, Nebraska, dated October 27, 1975, and immediate relief

by Mandamus (and/or prohibition) from the direct prior restraint on publication imposed by that order. Your Petitioners further pray that an immediate stay be issued by this Court against said order and that said order be vacated and held for naught.

Respectfully submitted,

THE STATE OF NEBRASKA, ex rel; NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTERS ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/ SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; AND WILLIAM EDDY

By: /s/ STEPHEN T. MCGILL  
Stephen T. McGill  
for MCGILL, KOLEY & PARSONAGE, P.C.  
Suite 217, 10050 Regency Circle  
Omaha, Nebraska 68114  
402-397-9988

*Attorneys for Relators*

STATE OF NEBRASKA  
COUNTY OF DOUGLAS, ss

KILEY ARMSTRONG, being first duly sworn, on oath deposes and says that she is one of the Relators herein; that she has read the foregoing Petition, knows the contents thereof, and that the statements therein contained are true as she positively believes.

/s/ KILEY ARMSTRONG  
Kiley Armstrong



Subscribed and sworn to before me this 31 day of October, 1975.

/s/ JAMES L. KOLEY  
Notary Public

James L. Koley, General Notary, State of Nebraska  
My Commission Expires October 10, 1976

IN THE SUPREME COURT OF NEBRASKA

Case No. 40471

THE STATE OF NEBRASKA, ex rel NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTERS ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY; *Relators*,

vs.

THE HONORABLE HUGH STUART, Judge, District Court of Lincoln County, Nebraska, *Respondent*.

**Petition in Intervention and Response of Erwin Charles Simants**

COMES now Erwin Charles Simants and shows to the Court that he has and claims an interest in the matter in litigation in this suit and in the success of the respondent, the Honorable Hugh Stuart, Judge, District Court of Lincoln County, Nebraska, and that he has such interest pursuant to Section 25-328, R.R.S., 1943, and in support of this petition in intervention shows the following facts upon which he rests his claim, to-wit:

**I.**

Intervenor is presently charged in the Lincoln County District Court with six (6) counts of felony murder pursuant to Section 28-401, R.R.S., 1943, having been bound over for trial in said Court by an order of the County Court of Lincoln County, Nebraska under date of October 22, 1975.

## II.

Intervenor and respondent further shows to the Court that trial by jury is set in the matter in which the State of Nebraska is plaintiff and Erwin Charles Simants is defendant for January 5, 1976.

## III.

Intervenor and respondent herein shows to the Court that on October 21, 1975 he did consent to a motion filed by the County Attorney of Lincoln County, Nebraska seeking to place certain restrictions upon the reporting, publication, and dissemination of news materials from his preliminary hearing scheduled in the Lincoln County Court on October 22, 1975, and that in addition thereto on the 21st day of October, 1975, he did move that all matters preliminary to his trial in the Lincoln County District Court be completely closed.

## IV.

On October 21, 1975 the Honorable Ronald A. Ruff, the duly elected and acting County Judge of Lincoln County, Nebraska entered an order restricting the dissemination of news and publication of such news from the preliminary hearing to be held on October 22, 1975. A copy of said order is attached hereto, marked Exhibit A, and pleaded as if set forth in full at this point herein.

## V.

Intervenor and respondent further shows to the Court that on October 23, 1975 he did again renew his claim in the Lincoln County District Court for closed hearings prior to a trial scheduled in his matter in which he is defendant and the Honorable Hugh Stuart, District Judge of the District Court of Lincoln County, Nebraska, entered an order placing certain restrictions upon the dissemination

and reporting of news from all matters preliminary to the actual trial. A copy of his order entered under date of October 27, 1975 is marked Exhibit B, attached hereto and pleaded as if set forth in full at this point herein. The intervenor and respondent herein again on October 23, 1975 moved before the Court to have all proceedings prior to trial completely closed.

## VI.

Intervenor and respondent herein shows to the Court that prior to the time of his trial scheduled on January 5, 1976, he anticipates filing various motions with the District Court of Lincoln County, Nebraska, to include, but not limited to, motions to suppress, motions for a change of venue, motions to sequester witnesses, motions to be removed to the penal complex at Lincoln, Lancaster County, Nebraska for the purposes of having tests performed therein, and shows to the Court that in connection with such motions it is necessary to file affidavits and have evidentiary hearings, all involving the matters surrounding the incident which occurred at Sutherland, Nebraska on October 18, 1975, and that dissemination of these items of evidence prior to the trial, which said items of evidence may or may not be admissible at the time of trial, would be in derogation of his right to obtain a fair public trial before an impartial jury.

## VII.

Intervenor and respondent herein further shows to the Court that the entry of the order herein by the Honorable Hugh Stuart, District Judge in and for Lincoln County, Nebraska, was correct and proper under the circumstances and that the Judge did in fact have the power and authority to close all preliminary hearings and further shows to the Court that the closing of the preliminary hearing is justifiable in that pursuant to law in the State of Nebraska a

preliminary hearing is such that evidence may or may not be introduced which would not be admissible upon a trial of this matter upon the merits, and that therefore, the dissemination of this evidence through the news media would be prejudicial to the defendant's rights in obtaining a fair public trial before an impartial jury.

### VIII.

Respondent and intervenor herein shows that the District Judge of Lincoln County, Nebraska, Hugh Stuart, in entering the order herein considered several matters upon which he based his order of October 27, 1975. (1) The District Judge herein considered the fact the Lincoln County Judge, Ronald A. Ruff, had entered an order restricting the press, and that in making his decision in the instant case the District Judge considered that to upset the order of the County Judge would, in effect, give a license to the press to publish anything and everything which would result in prejudicing the rights of the defendant herein to a fair and impartial trial by jury. The District Judge herein also considered in his decision a quotation in the North Platte Telegraph of October 24, 1975, published some three days before the entry of his order herein to the effect that "there is some question among newsmen as to whether the guidelines cover testimony at a preliminary hearing.", a copy of said article is attached hereto, marked Exhibit C, and pleaded as if set forth in full at this point herein. In addition, the District Judge, in reaching his decision, considered the argument of one of the attorney's for the press, Harold Kay, who in his arguments to the Court prior to the entry of the order herein said "As far as Lincoln County itself, I think I can safely say that it would be hard to find 12 impartial jurors to try this particular case in Lincoln County." A certified excerpt from the transcript of the proceedings held in the Lincoln County District Court on October 23, 1975 is attached hereto,

marked Exhibit D, and pleaded as if set forth in full at this point herein. In addition thereto, the District Judge considered the statement of Mr. Stephen McGill, one of the attorneys for the petitioners in this matter, who in his arguments to the Court prior to the entry of any order herein said "but I'd let somebody go free who was guilty before I would deny freedom of speech." A certified copy of the excerpt from the proceedings held in the District Court of Lincoln County, Nebraska on October 23, 1975 is marked Exhibit E, attached hereto and pleaded as if set forth in full at this point herein.

### IX.

Intervenor and respondent herein shows to the Court that it is necessary to have a restrictive order upon the dissemination of news and news material from all of the matters preliminary to the trial in the above entitled matter, and in support thereof says that Lincoln County, Nebraska has a population of 30,000 individuals and from which a jury must be chosen within the County, and that news media serving the County include 2 television stations, three radio stations, one local newspaper, and at least 2 newspapers that are circulated state wide.

### X.

Intervenor and respondent further shows to the Court that he is entitled to a fair and impartial trial by jury, free from outside influences and to have a verdict of that jury based only upon evidence admissible at the time of trial.

WHEREFORE, defendant prays that relators petition be dismissed and that the order of the District Court of Lincoln County, Nebraska entered by the Honorable Hugh Stuart as of October 27, 1975 be affirmed by this Court.



ERWIN CHARLES SIMANTS, Defendant

By: /s/ LEONARD T. VYHNALEK  
of BEATTY, MORGAN & VYHNALEK  
212 North Dewey—Box 548  
North Platte, Nebraska 69101  
(308) 532-5090

KEITH N. BYSTROM  
Lincoln County Public Defender  
P.O. Box 808  
North Platte, Nebraska 69101  
(308) 534-2120

*His Attorneys*

Supreme Court of Nebraska, Filed Nov. 24, 1975—George H. Turner, Clerk

IN THE SUPREME COURT OF NEBRASKA

Case No. 40471

THE STATE OF NEBRASKA, ex rel NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTERS ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY; *Relators*,

vs.

THE HONORABLE HUGH STUART, Judge, District Court of Lincoln County, Nebraska, *Respondent*.

**Petition in Intervention and Response of the State of Nebraska**

COMES now The State of Nebraska by and through Milton R. Larson, the duly elected, acting, and appointed County Attorney in and for Lincoln County, Nebraska, and shows to the court that it has and claims an interest in the matter in litigation in this suit and in the success of the respondent, the Honorable Hugh Stuart, Judge, District Court of Lincoln County, Nebraska, and that it has such interest pursuant to Section 25-328, R.R.S., 1943, and in support of this petition in intervention shows the following facts upon which it rests its claim, to-wit:

I.

Intervenor, State of Nebraska, by and through Milton R. Larson, Lincoln County Attorney, has charged one Erwin Charles Simants with six counts of first degree murder pursuant to Section 28-401 R.R.S., 1943, and said defendant

has been bound over for trial in said Court by an order of the County Court of Lincoln County, Nebraska, under of October 22, 1975.

## II.

Intervenor and respondent further shows to the Court that a trial by jury has been set in this matter in which the State of Nebraska is plaintiff and Erwin Charles Simants is defendant for January 5, 1976.

## III.

Intervenor and respondent herein shows to the Court that on October 21, 1975, Milton R. Larson, Lincoln County Attorney, did file a motion seeking to place certain restrictions upon the reporting, publication, and dissemination of news material from the preliminary hearing herein, scheduled in the Lincoln County Court for October 22, 1975, at the hour of 9:00 a.m.

## IV.

On October 21, 1975, the Honorable Ronald A. Ruff, the duly elected and acting County Judge of Lincoln County, Nebraska, entered an order restricting the dissemination of news and publication of such news from the preliminary hearing to be held on October 22, 1975.

## V.

Intervenor and respondent further shows to the Court that on October 23, 1975, the Honorable Hugh Stuart, District Judge, Lincoln County, Nebraska, entered an order placing certain restrictions upon the dissemination and reporting of news from all matters preliminary to the actual trial.

## VI.

Intervenor and respondent herein further shows to the Court that evidentiary matters adduced at the preliminary hearing herein held in the Lincoln County Court on the 22nd day of October, 1975, may or may not be admissible at the time of the trial and the dissemination of certain testimony given at said preliminary hearing would be detrimental to the right of the State of Nebraska, and its people to effective prosecution of its laws.

## VII.

Intervenor and respondent further shows to the Court that the entry of the order herein by the Honorable Hugh Stuart, District Judge, in and for Lincoln County, Nebraska, was correct and proper under the circumstances.

## VIII.

Respondent and intervenor herein shows that the District Judge of Lincoln County, Nebraska, Hugh Stuart, in entering the order herein considered several matters upon which he based his order of October 27, 1975. (1) The District Judge herein considered the fact that Lincoln County Judge, Ronald A. Ruff, had entered an order restricting the press and that in making his decision in the instant case, the District Judge considered that to upset the order of the County Judge, would in effect give a license to the press to publish anything and everything within their knowledge, which may present a clear and present danger to the empaneling of an impartial jury. The District Judge, herein also considered in his decision a quotation in the North Platte Telegraph of October 24, 1975, published some three days before the entry of his order herein to the effect that, "There is some question among newsmen as to whether the guidelines cover testimony at a preliminary hearing." In addition, the District Judge, in reaching his deci-

sion, considered the argument of one of the attorney's for the press, Harold Kay, who in his arguments to the Court prior to the entry of the order herein said "As far as Lincoln County itself, I think I can safely say it would be hard to find twelve impartial jurors to try this particular case in Lincoln County." In addition, thereto the District Judge considered the statement of Mr. McGill, one of the attorney's for the petitioners in this matter, who in his arguments to the Court prior to the entry of any order herein said "but I'd let somebody go free who was guilty before I would deny freedom of speech."

### IX.

Intervenor and respondent herein shows to the Court that it is necessary to have a restrictive order upon the dissemination of news and news materials from all of the matters preliminary to the trial in the above entitled matter, and in support thereof further says that Lincoln County, Nebraska, has a population of 30,000 individuals and from which a jury must be chosen within the County, and that news media serving the County include two television stations, three radio stations, one local newspaper, and at least two newspapers that are circulated state wide.

### X.

Intervenor and respondent further shows to the Court that it is entitled to the effective enforcement of its laws within the confines of the judicial system and that the people of the State of Nebraska are entitled to prompt and expeditious handling of criminal cases.

WHEREFORE, your intervenor and respondent prays that relators petition be dismissed and that the order of the District Court, of Lincoln County, Nebraska, entered by the Honorable Hugh Stuart, on October 27, 1975, be affirmed by this Court.

THE STATE OF NEBRASKA

By /s/ MILTON R. LARSON

Milton R. Larson

Lincoln County Attorney

Lincoln County Courthouse

North Platte, Nebraska 69101

(308) 534-4350

[Certificate of Service omitted in printing]





S.Su











## Special session begins, followed by confusion

By ERIC KRAMER  
Associated Press Writer

LINCOLN, Neb. (AP) — "We're off to a real good start in enhancing our image," said Sen. John Cavanaugh of Omaha.

His facetious remark came as the legislature began stumbling over itself shortly after the special session began Wednesday.

Shortly after Gov. J. J. Exon said, "The financial crunch that faces Nebraska is a manageable one if we have the courage to make the sacrifices, take the heat, and intelligently chart our restrained course for the immediate and long-range future," the Unicameral broke down in confusion.

Senators promptly voted 36-7 against adjourning immediately and decided not to discuss bills other than the four the governor presented.

Unfortunately, Sen. Wally Barnett's motion only said other bills could not be discussed and Lt. Gov. Gerald Whelan ruled that other bills could be introduced and possibly passed, but not discussed.

At that point, Omaha Sen. Eugene Mahoney, chairman of the Legislative Council Executive Board took control, set committee hearings on the four Exon bills and told his fellow senators to go home until 10 a.m. Nov. 3.

The Appropriations Committee is scheduled to begin three days of public hearings Wednesday on an Exon proposal to cut state expenditures by

\$10.4 million. Exon's cuts would come as a three per cent across-the-board reduction in the expenditures of state agencies to save \$6.9 million. The rest of the money would come from a \$2.5 million reduction in what Exon administration officials called a mistaken appropriation to the State Department of Education and a \$1 million reduction in the governor's emergency fund. The bill is LB6.

At the same time, the Appropriations Committee will also hold public hearings on another bill which would give the state treasurer authority to withhold payments if the state treasury runs low. The bill, LB3, establishes state employee salaries as the No. 1 priority, but as a practical matter, says payments to schools and local governments will be proportionately reduced when there is a cash shortage. They would receive the remainder of their money the following month when more cash came into the treasury.

Exon said he would not cut aid to schools and local governments, only delay it. He also said he would not cut appropriations for the Department of Corrections, because of an increase in prisoners.

Exon predicted the state would find itself \$11 million short in January and April with \$9 million deficits in February and March.

The Revenue Committee is scheduled to start two days of hearings at 9 a.m. Wednesday on a bill which would change

the formulas the State Board of Equalization will use when it sets tax rates in November.

The bill, LB4, basically allows the board to ignore factors that would promote budget surpluses and allow it to set tax rates which would barely avoid a treasury deficit.

If the bills come out of committee, the entire legislature will consider them a week from Monday. Another bill, LB5, which appropriates \$5,000 for the special session, will also be ready for floor debate at that time.

Three other bills introduced by senators apparently will die at the end of the special session without going to committee.

One, introduced by Bellevue Sen. Frank Lewis would have prevented a 1976 tax increase. Another Lewis proposal would have put the legislature in charge of setting tax rates.

Bellwood Sen. Loran Schmit introduced a bill which would have purchased John F. Kennedy College in Wahoo and turned it into a veterans home.

Senators voted down an invitation to the Nebraska Educational Television Network to provide statewide TV coverage of the committee hearings. Mahoney said he may decide next year to limit legislative television coverage to two days per year.

"As we deliberate in this special session, and look forward to future regular sessions, we must insist that the plight of New York City and the federal government will not be ours," Exon said. "Nebraska can escape such situations if we are intelligently perspective, plan our work, and work our plan."

EXHIBIT

#44

10/23/75



A last hurrah  
for summer

With winter approaching, Kent Andreasson of rural North Platte romps through the crunchy leaves of autumn on a golden afternoon. Soon the cold winds of November will strip the trees. Indian Summer will fade, and the earth will slip into the sleep of winter. But until then, autumn is meant for enjoying. Telegraph colorphoto by Wayne Jacobsen.

## Caroline Kennedy unhurt in explosion

LONDON (AP) — Caroline Kennedy narrowly escaped death or injury and was reported "very shaken" in a bombing today that blew up the car of her British host, an anti-terrorism campaigner.

The bomb, which senior detectives said they believed was planted by the Irish Republican Army, killed one of Britain's leading cancer specialists, who was walking nearby, and wounded seven other persons.

The estimated five to seven pounds of explosives blew up the white jaguar outside the home of Conservative politician Hugh Fraser, where Miss Kennedy, daughter of the late President John F. Kennedy, was staying. The two had been planning to leave the house at about the time of the blast.

The explosion shattered windows of the four-story townhouse. Fraser's forehead was slightly cut by flying glass. He said Miss Kennedy was uninjured but "very shaken."

The 8:53 a.m. blast maimed and killed Prof. Gordon Hamilton Fairley, a neighbor, as he was taking his poodle for a walk.

Seven other persons, including a Filipino woman who worked as a cook and housemaid for Fraser, suffered minor injuries.

Fraser and the 17-year-old Miss Kennedy had been planning to leave the house at about the time of the blast but a telephone call from a fellow member of Parliament kept them inside, Fraser said.

"Normally I would have been in the car when this happened but I was on the telephone," said Fraser, who in his public speeches has taken a tough stance against terrorism. The bomb had been placed under his car.

"There is no doubt it was meant for me — somebody obviously wants to blow me up," Fraser told newsmen and added: "I'm not surprised. I can think of a lot of people who would want to blow me up."

Miss Kennedy is living at Fraser's home while studying art at Sotheby's auction house. She was due for classes at 10:30 a.m., an hour and a half after the bombing, but a spokesman at Sotheby's said a member of the Fraser household telephoned that she would not attend today.

The bombing occurred in Campden Hill Square, a tree-lined area of elegant old town houses in the fashionable West Kensington residential district.

Police said one theory was that the bombing was in revenge for the life sentences given three Irishmen and an 18-year-old English girl on Wednesday morning at the Old Bailey Criminal Court for the killing of seven persons in the bombing of three pubs last October.

## Winter arrives in Panhandle

By The Associated Press

Winter-like weather arrived in western Nebraska Thursday.

The State Patrol even reported slippery road conditions in some Panhandle areas early Thursday.

The storm moved from the Rockies into the western part of the state and indications were that moisture connected with the storm would bring an end to the long dry spell in the state.

The weather map showed a strong cold front stretching from a low in southeastern Minnesota across southeastern Nebraska to another low in extreme southeastern Colorado.

The weather map featured early Thursday a sharp cold front lying across northwest Iowa and southeast Nebraska. The front was expected to become stationary across western Iowa and central Kansas Thursday night.

As a result, heavy snow warnings have been issued for the Nebraska Panhandle through Friday, with about six inches of snow expected by Friday morning.

Rain or thundershowers were expected to develop over the remainder of Nebraska.

Lows temperatures Thursday night should range from the 30s west to near 50 east, with highs Friday in the 30s west and the mid 50s to low 60s east.

## Simants to stand trial

Erwin Charles Simants, charged with murder in the death Saturday of six Sutherland residents, will stand trial probably "around the first of the year," Lincoln County Attorney Milton Larson said Wednesday.

County Judge Ronald Ruff Wednesday afternoon bound Simants over to District Court for trial following the conclusion of a four-hour preliminary hearing. Ruff told the defendant that the evidence presented showed beyond a reasonable doubt that the crimes alleged had been committed. Further, the

judge said, the evidence showed there was probable cause to believe that Simants committed the crimes.

Amended charges including possible sexual assault were filed against Simants Wednesday. The 29-year-old Sutherland resident is now charged with six counts of first degree murder while "in the perpetration of or attempt to perpetrate a sexual assault."

The complaint does not specify against which person or persons the alleged sexual assault was attempted or committed.

First-degree sexual assault was defined in LB 23 passed by the 1975 Legislature. The bill, the first revision of Nebraska's rape statutes in 100 years, replaced the word "rape" in the law with two degrees of sexual assault.

First-degree sexual assault is defined in the law as "sexual penetration" of the victim.

Simants is accused of fatally shooting Henry Kellie, 66; his wife, Marie, 57; their son, David, 32; and three grandchildren, Daniel, 5, Deanne, 6, and Florence, 10.

The preliminary hearing was completed Wednesday afternoon about the same time that funeral services for the six Kellies were ending at Sutherland.

Judge Ruff again denied bail for Simants. "Six persons are dead, including three children," he told Simants, who was standing before him. He said the "magnitude" of the crime was such that bail could not be justified.

The prosecution called four more witnesses to the stand Wednesday afternoon, including three State Patrol investigators and County Sheriff Gordon Gilster.

Their testimony cannot be reported, however, since Ruff issued Wednesday morning a "restricted coverage order" barring press reports of the testimony. The defense did not call any witnesses to the stand.

In the morning, the prosecution called five witnesses: Dr. Miles Foster, a North Platte pathologist; Mrs. June Lindstrom, emergency medical technician for the Sutherland ambulance; Herb Meissner, Sutherland mayor and a friend of the Kellies; James Robert (Butch) Boggs, 13-year-old nephew of Simants and neighbor of the Kellies; and Amos Simants, father of the accused.

For the first time in three court sessions, Simants was not handcuffed during Wednesday's hearing. Both Sunday morning when he was arraigned and Tuesday night when motions to restrict press coverage were heard, Simants was handcuffed to the wrist of Gilster.

Yesterday, Simants sat beside his attorneys, Public Defender Keith Bystrom and Assistant Public Defender Leonard Vynnaek. His sitting position and facial expression changed little during the four hours.

When the hearing was completed, Deputy Sheriff Bob Smith offered Simants a cigarette and he readily accepted it. Then the deputy handcuffed Simants' wrist to his own and the accused was returned to jail.

## Media challenge 'gag'; say it 'muzzles press'

Editorial, page 4

A motion calling Judge Ronald Ruff's restricted press coverage order "repugnant to and in violation of" the U.S. and Nebraska Constitutions was filed in District Court today by a group of Nebraska news organizations. The motion, which Judge Hugh Stuart was expected to hear this afternoon, challenges the so-called "gag order" which barred reporting of testimony given in the preliminary hearing for Erwin Charles Simants.

Joining in the challenge were the Western Publishing Co., owner and publisher of the North Platte Telegraph; the Nebraska Press Association; The (Lincoln) Journal-Star Printing Co.; Omaha World-Herald Co.; North Platte Broadcasting Co. (KODY Radio); Nebraska Broadcasters Assn.; Associated Press and United Press International.

The motion says Ruff's order violates Amendments 1, 6 and 14 of the U.S. Constitution; Article 1, Sections 5, 11 and 13 of the Nebraska Constitution; and Section 24-311 of Nebraska statutes.

The motion notes that, "Public trial is and has been a basic tenet of our legal heritage," and adds, "Equally basic to our system is the free interchange of information concerning our judicial system."

The motion says Ruff's order "in effect, denies a public hearing by silencing all of those present; and the County Court's blanket gag rule is virtually unknown to our system of justice."

Noting that the order also prohibits

any party to the case, law enforcement officials, public officers, attorneys, witnesses and news media from "disseminating any information" concerning the case, apart from the preliminary hearing, the motion says:

"(The order) smacks of precensorship with the resulting evil of muzzling of a free press and it would even, apparently, prohibit the public and the press from the non-official investigative rights which have heretofore been assumed to be a part of our judicial system and a right of our society."

Earlier, G. Woodson Howe, executive assistant to the president of the Omaha World-Herald, said, "For possibly the first time in Nebraska, a judge has ordered that the public be deprived of a timely account of what goes on in a public courtroom."

"The effect of Judge Ruff's order is to deny the people of the State of Nebraska their right to observe the workings of the criminal justice system," he said.

Howe, who is also chairman of Media of Nebraska, a coalition of print and broadcast news media, added, "Courts are public institutions. Each phase of a trial should be a public event. The inevitable result of censored court proceedings is to deny facts to the public and to breed suspicion, rumor and speculation."

Larry Walklin, president of the Nebraska Society of Professional Journalists-Sigma Delta Chi, said the order deprives citizens "of their legal right of access to the criminal justice system."



VICTIMS' FUNERAL — Caskets containing the bodies of Mr. and Mrs. James H. Kellie, their son, David, and their three grandchildren

are placed in a convoy of six hearses following services Wednesday at Sutherland.

## Sutherland turns out for services

SUTHERLAND — Rest home residents in wheel chairs and youngsters in blue jeans were among a crowd estimated at nearly 1,000 who filled the flower-banked Sutherland high school gym Wednesday afternoon for the funeral of six members of a local family slain Saturday.

But there was "no hatred or rebellion" in the hearts of the survivors, said the Rev. Mrs. Verneeda Brown of the Wesleyan Church at Arthur. She is the mother-in-law of Mrs. Audrey Brown, only surviving daughter of Henry Kellie, 66, and his wife, Marie, 57, who were slain in their home Saturday, along with their son, David, 32, their

granddaughter, Florence, 10, and David's two children, Daniel, 5, and Deanne, 6.

Awaiting district court trial on six counts of first degree murder is a neighbor, Erwin Charles Simants, 29.

"This has been a hard assignment handed to me today," said Mrs. Brown, whose voice trembled as she recounted how her and the Kellies' children had grown up together.

"There have been tragedies before...there will be after this one," she said, but nothing of this magnitude had struck the community before.

"We'll understand it better by and

bye," she said. And "this great crowd...shows you're going to help lift the load" thrust upon the survivors, she added.

The Rev. Nels Ibsen of the Sutherland Wesleyan Church noted that Mrs. Kellie had been the church treasurer and that Mr. Kellie had devoted much time to the rest home at Sutherland.

"I don't know what I'm going to do without him," he said.

The crowd was generally composed during the hour-long service which concluded at the rural Sutherland cemetery on a hill south of town where the six coffins were laid in two graves.



# Monday in mass murder

A preliminary hearing has been scheduled for 9 a.m. Wednesday in Lincoln County Court for Erwin Charles Simants, 29, of Sutherland, charged Sunday with six counts of first degree murder. At the request of County Attorney Milton Larson, Judge Ronald Ruff ordered Simants held without bail.

Simants is accused of killing six members of the Henery Kellie family in the Kellie home on the north edge of Sutherland Saturday night. Five persons were found dead in the home, while the sixth died shortly after being admitted to Great Plains Medical Center in North Platte.

#### The victims:

—James Henery Kellie, 66, a semi-retired farm laborer;

—His wife, Audrey Marie Kellie, 57, a cook at Moore Memorial Nursing Home in Sutherland;

—Florence Marie Kellie, 10, a granddaughter adopted by the Kellies. Florence's mother, Jennie Kellie Rowley, was killed in a car accident about nine years ago.

—David LeRoy Kellie, 22, one of three Kellie children, an employee of Hershey Mills. A sister, Audrey, is the only surviving child.

—His son, Daniel LeRoy Kellie, 5, a kindergarten pupil at Sutherland.

—Deanna Lynn Kellie, 7, a second grader at Ogallala, who lived with her mother in Ogallala. She was apparently visiting her father, who, with Daniel, had apparently gone to the Henery Kellies for dinner.

The bodies of Mr. and Mrs. Kellie and those of the three children were found in Kellie's five-room frame house following an anonymous phone call to the Sutherland light plant shortly after 9 p.m. Saturday.

Simants surrendered to Lincoln County Sheriff Gordon "Hop" Gilster and other law enforcement officers about 8:30 Sunday morning outside the home of Simants' sister and brother-in-law, Mr. and Mrs. William Boggs. Simants had recently been staying in the Boggs home, which is next door to the Henery Kellie residence.

Judge Ruff denied bond for Simants in open court Sunday morning after hearing reasoning by Lincoln County Attorney Milton Larson in a closed session. Larson requested the closed session, he said, because evidence presented might have resulted in prejudicial pre-trial publicity.

The bond request was made by Keith Bystrom, county public defender, appointed to the case by Ruff. Leonard Vyhnaek, assistant public defender, was also appointed.

Ruff told Simants and his attorneys they could return to court within 24 hours to give more detailed reasons for seeking bond. But no request was made Monday morning.

Simants, a slight, dark-haired man dressed in blue-striped denim jail fatigues, sat with his head bowed as charges against him were read. He showed no emotion as he answered the judge's questions with a nod or a barely-audible voice. He said "No" when asked by Ruff whether he had any money to hire an attorney and gave the same answer when asked if he had any questions about his rights or the charges against him.

Following his arraignment, Simants was taken to Lincoln County jail.

Under Nebraska law, conviction on first-degree murder charges is punishable by death in the electric chair or life imprisonment. The last person executed under that law was Charles Starkweather in June 1959. Starkweather confessed to slaying 11 persons in 1958.

Simants' capture ended an uneasy night for Sutherland's 850 residents.

"I can't imagine it in a little town like this," said Clyde Linstrom, who said he talked with Simants' father, Amos, a short time after the shootings.

Standing near the Kellie home Saturday night, the elder Simants tearfully said, "My son killed five or six people here," according to Linstrom.

The elder Simants said his son told him of the slayings, Linstrom said. But when his father suggested he turn himself in, Erwin fled, according to Linstrom.

## NP, Ogallala voters go to polls Tuesday

Other stories, Page 10

Editorial, Page 4

North Platte and Ogallala voters go to the polls Tuesday to decide major school building bond issue proposals.

Ogallalans are being asked to approve a \$5.5 million plan which would enlarge its West Fifth Elementary School, eliminate the 66-year-old West Ward Elementary and a 55-year-old junior high building, and construct a new, combined junior and senior high building on a 35-acre tract north of the town. The present senior high would be converted to an elementary school. The proposal would increase property taxes there about 24 mills in the first year of payment on proposed 20-year bonds, school officials estimate.

Polls at Ogallala are open from 7 a.m. to 7 p.m. MDT.

At North Platte, polls will be open from 8 a.m. to 8 p.m., CDT. A heavy turnout, based on an unusually large advance registration, is expected.

About 11 hours after the shootings occurred, Simants was captured outside the Boggs home. Gilster said Simants told him he wandered all night before going to the Boggs home Sunday morning. Gilster said Simants knocked on the Boggs' front door, but he was refused entry.

The Boggs alerted authorities that Simants was at their home and the capture was made minutes later as Simants tried to flee.

Simants gave up with little resistance and no weapon was found in his possession. During the night, a .22-caliber rifle believed used in the shootings was found near the Kellie home.

Gilster said Simants told him that he went to both the Rodeo and Longhorn bars in Sutherland after the shootings occurred and ordered a beer in each. "The patrons didn't know anything about it (the shootings)" at the time,



Henry Kellie  
(1958 photo)



Marie Kellie



David Kellie  
(1962 photo)



Florence Kellie



Daniel Kellie



Deanna Kellie

Gilster said.

Gilster said Simants later "wandered in the weeds" near the scene of the crime. Sometime after midnight, a family half a mile east of the crime scene called the sheriff's office, saying that their dogs were barking and there might be a prowler. A half dozen officers checked the area but no one was found.

The call summoning authorities to the Kellie home Saturday night was made to the light plant, where emergency calls are received.

Floyd Paulman, who received the call at the plant, said the voice sounded like David Kellie.

"He (Kellie) said, 'We need an emergency unit.' I know that voice because I've heard it many times before. The person turned away from the phone as if to talk to someone and then said (into the phone) where the emergency unit should go."

Paulman said the caller hung up without identifying himself.

Mrs. Linstrom, an ambulance attendant, was one of the first persons to arrive at the Kellie residence. A "very, very close friend" of the family, she said she had assisted with the delivery of Florence when the child was born.

When she got to the Kellie home, Mrs. Linstrom said, she saw two bodies in the living room. A third body was in a hallway, along with David. David was taken to the North Platte hospital but he died of two bullet wounds to the head shortly after arrival.

Two other bodies were found in a bedroom at the rear of the home.

## Kellie paid Simants' fine

Henery Kellie saved Erwin Charles Simants from jail Sept. 29, according to friends of Kellie.

According to the friends, Simants had been fined \$50 for public intoxication but was unable to pay the fine. The Rev. Nels Ibsen, Kellie's pastor, said Kellie paid the fine "so he (Simants) didn't have to lay it out in jail."

"Henery was well liked and it was just his nature to help people," said the minister. "I don't know if he had ever paid anyone's fine before, but he'd shelled out money to help in other ways."

Kellie, Pastor Ibsen said, had befriended Simants while he stayed with Simants' sister, Mrs. William Boggs, next door to the Kellie residence.

### Co-operative effort on stories

Stories in today's Telegraph concerning the Kellie shootings in Sutherland Saturday night were compiled from reports by Telegraph staff members Bill Eddy, John Colone, Laura Poland, Roger Morris, Wayne Jacobsen and Lilly Frels, plus reports from Sally Schuff, Sutherland Courier-Times editor; Dean Terrill, Lincoln Journal reporter; Edward C. Nicholls, Associated Press writer; and Ramon F. Casas, United Press International reporter.

Colone and Mrs. Schuff were in Sutherland Saturday night and Sunday, while Eddy, Ms. Poland and Morris handled telephone calls, checked law offices and monitored law enforcement radio calls from North Platte. Reports were fed throughout the weekend to both AP and UPI, including eight photographs moved on the national wires.

## Services for Kellies to be Wednesday

SUTHERLAND — Combined services for the six members of the Kellie families, who were slain Saturday night at the home of the senior Kellies at Sutherland, will be Wednesday at 2 p.m. at the Sutherland High School gymnasium.

Victims were James Henery Kellie, 66; his wife, Audrey Marie Kellie, 57; their son, David LeRoy Kellie, 22; the latter's children, Deanna Lynn, 7, and Daniel LeRoy, 5; and the senior Kellies' granddaughter, Florence Marie Kellie, 10. All lived at Sutherland, except Deanna Lynn, who lived with her mother, Pamela Guggenmos of Ogallala.

Officiating at the services will be the Rev. Verneeda Brown of the Wesleyan Church of Arthur and the Rev. Nels Ibsen of the Wesleyan Church of Sutherland. The Rev. Brown is the mother-in-law of Mrs. Melvin (Audrey) Brown, daughter of James Henery and Audrey Kellie. The Melvin Browns are of Boulder, Colo., formerly of North Platte.

Burial will be in the Sutherland Cemetery. Ryan and Tickle and Adams and Swanson Funeral homes of North Platte are in charge of the services and the bodies are lying in state at Ryan and Tickle Funeral home.

The caskets will not be open. Memorials have been established.

James Henery Kellie, a farm laborer, was born July 1, 1909, at Funk. He grew up in the Kearney and Minden area and moved from Imperial to Sutherland about 20 years ago. He attended the Wesleyan Church at Sutherland.

Audrey Marie Kellie was born Feb. 14, 1918, in Perkins County and was employed as a cook at Moore Memorial Nursing Home. She was a member of the Wesleyan Church at Sutherland.

Surviving the couple, in addition to the daughter, are four grandchildren. Mr. Kellie's survivors also include three brothers, Lewis of Curtis, Milroy of California and Elmer of Nebraska; two sisters, Mrs. Irene Peterson and Mrs. Stella Williams, both of Denver, Colo.

Other survivors of Mrs. Kellie are two brothers, Earl Matson of Grant and Erie Matson of Denver; and five sisters, including Mrs. Mary Stivers of Grant.

David LeRoy Kellie, who was born March 6, 1943, at Paxton, was a graduate of Sutherland High School in 1961. He had been in the Army Reserve and had worked at the ordnance plant in Grand Island before his employment at the Hershey Mills.

He was a member of the Wesleyan Church at North Platte. His sister is his only survivor.

Deanna Lynn Kellie, who was born March 14, 1968, at North Platte, was a second grader at Ogallala Public Schools.

Daniel LeRoy Kellie, who was born Aug. 23, 1970, was a kindergartener at Sutherland Public School.

Surviving the two, besides their mother, Pamela Guggenmos, are grandparents, Mr. and Mrs. Floyd Ingram of Ogallala and Mr. and Mrs. Clarence Chessmore of Sutherland and great-grandparents, Mr. and Mrs. Leo Tegler of North Platte.

Florence Marie Kellie, who was born March 13, 1965, at Sutherland, was a fifth grade student at Sutherland. She was the daughter of the late Jennie Kellie Rowley, who died as the result of an auto accident eight years ago.



## Sutherland faces the long night with fear

SUTHERLAND — Fear permeated the darkness of Saturday night and Sunday morning. Sutherland huddled behind locked doors while a murder suspect roamed the night.

Rumors had preceded over facts as uncertainty compounded the uneasy heartbeats of a community in terror. Sutherland was afraid of the dark.

Despite being the focal point for coverage by every major wire service, national radio and national television networks, Sutherland residents were uninformed about what was going on.

"Everyone in town who had a gun probably had it loaded and with them, or knew where it was," Lincoln County Deputy Sheriff David Suter said. "At least that's what people told me Sunday."

Not knowing exactly what was going on, Sutherland spent a restless night. Area radio and television outlets were informed at 9:30 p.m. by law enforcement officials that five persons had been shot and killed in Sutherland, and that a sixth person had also been shot. Regular programming was interrupted with bulletins of the incident, along with a request to Sutherland residents to stay off the streets and to use caution before letting anyone enter their homes.

A dance was in progress at the American Legion Hall, and about 10 p.m. law enforcement officers told the dance promoter to close the event and to send everyone home. Sutherland was in the dark about events at the Henery Kellie home.

A long wait started. Sutherland residents began a vigil that was to continue until Sunday morning when Erwin Charles Simants peacefully surrendered to Lincoln County Sheriff Gordon Gilster.

The first reports to the media indicated the murder suspect was a male, about five-foot nine-inches tall, wearing a brown and white jacket and blue jeans. His approximate age was given as 33.

Several press conferences were held during the night. Deputy County Attorney Marvin Holscher doing all of the talking while County Attorney Milton Larson stood by. Sutherland Mayor Herbert Meissner held his own press conference, giving the first reported identification of the victims.

Hard, concrete facts about the incident at the Kellie home, were drawn out bit-by-bit throughout the night. Early Sunday a new description of the murder suspect was released. The age of the person being sought was given as 29, the height changed from 5-9 to 5-7½, and a weight estimate of 130 pounds added to the original notation. Also added to the description were the facts the suspect had brown hair and a dark complexion. Sutherland's city hall became a beehive of activity. Phone calls started coming in from New York and other national news services seeking information. City hall also became the headquarters for press representatives and law enforcement officers.

An anxious press contingent, promised they would be informed about events at the Kellie home, deserted the city hall location and received permission to stay near the Kellie home while Nebraska State patrol officers conducted their investigation. Holscher held a news conference in front of the Kellie home — giving a few basic facts about the murders.

He said the search was still being centered in the Sutherland area, and that no information had been received that the murder suspect had been sighted. He declined to release an identity of the victims or the person being sought. Holscher said that a gun had been found near the scene, but refused to comment on what type of weapon had been found. He did rule out a shotgun, but when pressed for more information, cut off the conversation and returned to the Kellie house.

Reports started coming from outside Sutherland that a sniper was being sought, but the reports turned out to be rumors, not fact. A program on national television Saturday night about the sniper who terrorized the University of Texas, contributed to the rumor of a sniper in Sutherland.

Among other rumors circulating in Sutherland was one that authorities had



**SITE OF SLAYINGS** — A state patrolman stands in front of the Henery Kellie home where Kellie, his wife, son and three grandchildren were shot to death Saturday night. At left is the house where the suspect in the shootings had been staying.

been ordered to "shoot to kill" in the matter. "There was never any order like that," deputy Suter said. "We would much rather have gotten him the way we did. There are a lot of questions to be answered."

Phone lines in Sutherland were jammed, local residents talking among themselves trying to piece together incidents of the night and those from out of town with friends and relatives in Sutherland trying to get long-distance lines to find out the situation.

Suter also said there was not a door-to-door search conducted as reported by some national media. "We searched a number of out-buildings and some residents called and wanted us to check out their homes, but we never did run a

door-to-door search."

Three buses carrying Sutherland High School band students were greeted by law enforcement personnel at the school Saturday night when they returned from a music contest in Chadron. Law enforcement authorities stood by while concerned parents picked up their children. One woman asked a Nebraska State patrol trooper if he'd seen her daughter. She planned to take her entire family to Wallace Saturday night rather than staying in Sutherland.

"Sutherland residents were 'real good' about staying off the streets," Suter noted. "Maybe it was more out of fear than cooperation, but it had the same effect as our request to go home and stay put."

Sutherland's two bars, where it was later reported Simants went following the murders, closed earlier than usual. One bar stayed open, refusing admission to anyone unknown to them.

Nebraska State Patrol and Lincoln County squad cars patrolled the streets in Sutherland and cruised the country roads around Sutherland during the night. The presence of law enforcement gave a little comfort to Sutherland residents.

Some turned out their lights and spent an uneasy night. The lights in many Sutherland homes glowed brightly all night long.

The investigation at the Kellie home continued all night, with every possible scrap of evidence catalogued for future reference. About 3:30 a.m. the process of removing the bodies started.

Several reports of prowlers turned out to be false alarms, but authorities checked out every call before discounting any possible leads.

An extensive air and ground search was planned for Sunday, and authorities threw up roadblocks around Sutherland shortly before dawn, searching each car in case it contained the murder suspect.

William Boggs, brother-in-law of the murder suspect, chatted with news reporters in front of the Kellie home, as uncertain as anyone about the one unanswered question, "Why?"

North Platte subscribers should receive their newspaper by 5:30 p.m. weekdays and by 7:30 a.m. Saturdays. If you do not receive your newspaper call your carrier or the North Platte Telegraph before 7 p.m. weekdays. On Saturday call before 11 a.m.



**NEWS CONFERENCE** — Lincoln County's Deputy County Attorney Marvin Holscher (with flashlight) held a press conference in front of the Henery Kellie home in the pre-dawn hours of Sunday while an investigation into the shooting deaths of six Sutherland residents was being conducted. Information was slowly released throughout the night. Erwin Charles Simants peacefully surrendered near the Kellie home Sunday morning, closing out a sleepless night for most residents of the community.

## Questions still remain

Many questions concerning the Kellie killings remain unanswered today. Some may be answered if and when Erwin Charles Simants stands trial. Others will always be a puzzle.

The ultimate question, of course, is why — why were the Kellies' lives taken? If a motive is known, law enforcement officers and the county attorney's office aren't saying, at least for now.

Also unanswered is how — how did someone enter the Kellie home and shoot six persons, apparently with a rifle?

Other questions:

— Who made the phone call to the light plant asking for an ambulance? Floyd Paulman, who received the call, said the voice sounded like David Kellie. But could it have been Kellie, if he had been shot twice in the head already?

Paulman also was quoted as saying the caller "turned away from the phone as if to talk to someone and then said (into the phone) where the emergency unit should go." Did the caller actually talk to one of the victims or someone else?

— Had the suspect, or the Kellies, for that matter, been watching the movie on television earlier that evening? The movie was "The Deadly Tower", a drama based on the incident in 1966 in Austin, Texas, when a sniper killed and wounded several persons.

Early reports on the Sutherland killings from law enforcement officers did not indicate that all the killings had taken place in one location and one deputy told a national radio network, "All we know is that there's someone up there and he's shooting people."

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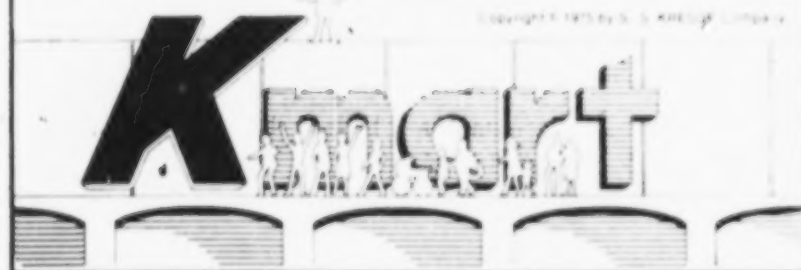
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Supreme Court, U. S.  
FILED

JAN 26 1976

DOAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1975

**No. 75-817**

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NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD  
COMPANY; THE JOURNAL-STAR PRINTING CO.;  
WESTERN PUBLISHING CO.; NORTH PLATTE BROAD-  
CASTING CO.; NEBRASKA BROADCASTING ASSOCIA-  
TION; ASSOCIATED PRESS; UNITED PRESS INTERNA-  
TIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE  
SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA  
DELTA CHI; KILEY ARMSTRONG; EDWARD C.  
NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY,  
*Petitioners,*

v.

THE HONORABLE HUGH STUART, JUDGE DISTRICT COURT  
OF LINCOLN COUNTY, NEBRASKA, ERWIN CHARLES  
SIMANTS, INTERVENOR, AND THE STATE OF NE-  
BRASKA, INTERVENOR,

*Respondents.*

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On Writ of Certiorari to the  
Supreme Court of the State of Nebraska

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**BRIEF OF PETITIONERS**

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E. BARRETT PRETTYMAN, JR.  
HOGAN & HARTSON  
815 Connecticut Avenue, N.W.  
Washington, D.C. 20006

JAMES L. KOLEY  
STEPHEN T. MCGILL  
MCGILL, KOLEY & PARSONAGE, P.C.  
Suite 300  
10010 Regency Circle  
Omaha, Nebraska 68114

*Attorneys for Petitioners*



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD  
COMPANY; THE JOURNAL-STAR PRINTING CO.;  
WESTERN PUBLISHING CO.; NORTH PLATTE BROAD-  
CASTING CO.; NEBRASKA BROADCASTING ASSOCIA-  
TION; ASSOCIATED PRESS; UNITED PRESS INTERNA-  
TIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE  
SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA  
DELTA CHI; KILEY ARMSTRONG; EDWARD C.  
NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY,  
*Petitioners,*

v.

THE HONORABLE HUGH STUART, JUDGE DISTRICT COURT  
OF LINCOLN COUNTY, NEBRASKA, ERWIN CHARLES  
SIMANTS, INTERVENOR, AND THE STATE OF NE-  
BRASKA, INTERVENOR,

*Respondents.*

On Writ of Certiorari to the  
Supreme Court of the State of Nebraska

**BRIEF OF PETITIONERS**

**OPINIONS AND ORDERS BELOW**

The opinions of the County Court of Lincoln  
County, Nebraska, dated October 22, 1975, and the  
District Court of Lincoln County, Nebraska, dated

October 27, 1975, are set forth at pages 1a and 9a of the Appendix to the Amended Petition for a Writ of Certiorari (hereinafter "Cert A"). The *per curiam* statement of the Nebraska Supreme Court issued on November 10, 1975, is set forth at Cert A 19a. The opinion of Mr. Justice Blackmun dated November 13, 1975, appears at Cert A 21a. The Order of the Nebraska Supreme Court for Hearing and Order to Show Cause entered on November 18, 1975, appears at Cert A 29a. The opinion of Mr. Justice Blackmun dated November 20, 1975, is set forth at Cert A 35a. The majority, concurring and dissenting opinions of the Nebraska Supreme Court dated December 1, 1975, are set forth at Cert A 44a and are reported at 63 Neb. S.C.J. 783, — N.W. 2d —. The Orders of this Court, dated December 8, 1975, and December 12, 1975, which, *inter alia*, granted the motion of Petitioners to treat papers previously filed by them with this Court as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska and which granted said Petition are set forth at Cert A 70a and 71a. Except as indicated above, none of said opinions is thus far reported.

#### JURISDICTION

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1970).

#### QUESTIONS PRESENTED

1. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, an injunction may issue prohibiting publication by the press of information revealed in public court proceed-

ings, in public court records, and from other sources about pending judicial proceedings.

2. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, a direct prior restraint may be imposed upon the publication by the press of information which does not relate to national security and which could not surely result in direct, immediate and irreparable injury to the nation or its people.

3. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, the injunction of the Nebraska Supreme Court dated December 1, 1975, prohibiting publication by the Petitioners can be sustained as a matter of fact and law on this record.

#### CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law \* \* \* abridging the freedom of speech or of the press \* \* \*.

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed \* \* \*.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law \* \* \*.



# STATEMENT OF THE CASE

## (a) Matters Leading to the Grant of Certiorari

Petitioners in this case are Nebraska newspaper publishers, broadcasters, journalists and media associations, and national newswire services that report from and to Nebraska. Petitioners are engaged primarily in the business of gathering, reporting, publishing and broadcasting local, national and international news, as well as other matters of interest, to their readers, listeners and general public. Petitioners were ordered in a series of decisions of the County Court in and for Lincoln County, Nebraska, the District Court in and for Lincoln County, Nebraska, and the Supreme Court of the State of Nebraska to refrain from publishing a broad spectrum of information, much of which was and is a matter of public record, related to a case now pending in Nebraska entitled *State v. Simants*. The factual background relating to these orders is, in brief, as follows:

On or about October 18, 1975, six members of the Henry Kellie family were allegedly murdered in the Kellie home in Sutherland, Nebraska. The community was immediately alerted by a break-in news announcement on television. The police requested residents to stay off the streets and to use caution about persons trying to enter their homes. A dance was closed, several bars were shut down, at least one entire family left town, and rumors spread that a sniper was loose in Sutherland and that the authorities had been ordered to shoot on sight (Joint Appendix—hereinafter “JA”—84). Authorities said that most people with guns had them loaded (JA 83, 84).

The next day, October 19, 1975, Erwin Charles Simants was arrested by the Lincoln County Sheriff and charged with six counts of murder in the first degree in a complaint filed in the County Court of Lincoln County, Nebraska (JA 4). News of Simants’ arrest was immediately broadcast over radio and television and reported in the press. As one press report put it, “News of the capture of the suspected killer early Sunday morning relieved the tension of the long night for the community residents and law officers” (JA 83).

An arraignment hearing was held before the County Court on the same day as the arrest, and several journalists were in attendance. At the request of the County Attorney, one portion of the hearing was conducted openly, and another was closed by the court to the press and the public.<sup>1</sup>

On October 20, the Lincoln County Attorney told the press that Simants had given authorities “a statement” (JA 88), and the next day, October 21, he further told the press that he had a theory as to motive which might be confirmed by a still-uncompleted autopsy report (JA 85, 91, 92).

At about 7 PM on the evening of October 21—the day before a scheduled preliminary hearing<sup>2</sup>—the prosecution filed a motion with the County Court requesting that a restrictive order be entered by that court against the press. The entire motion, which was

<sup>1</sup> See Affidavit of Kiley Armstrong dated October 31, 1975, ¶ 2, which appears at JA 13 and which is hereinafter cited as “Armstrong Affidavit.”

<sup>2</sup> The purpose of the preliminary hearing was to determine whether Simants should be bound over to the District Court of Lincoln County, Nebraska, on the charges against him.

unaccompanied by any affidavits, exhibits or other supporting material, read as follows:

The State of Nebraska hereby represents unto the Court that *by reason of the nature of the above-captioned case*, there has been, and no doubt there will continue to be, mass coverage by news media not only locally but nationally as well; that a preliminary hearing on the charges has been set to commence at 9:00 a.m. on October 22, 1975; and there is *a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury* and tend to prevent a fair trial should the defendant be bound over to trial in the District Court if testimony of witnesses at the preliminary hearing is reported to the public.

WHEREFORE, the State of Nebraska moves that the Court forthwith enter a Restrictive Order setting forth the matters that may or may not be publicly reported or disclosed to the public with reference to said case or with reference to the preliminary hearing thereon, and to whom said order shall apply. [JA 8; emphasis added.]

At about 7:30 PM that same evening, argument was made to the court on the prosecution's motion. The defense joined in the prosecution's request, again without even an offer of supporting evidence, and also moved that the preliminary hearing be closed to the public and the press. No evidentiary hearing was held; no testimony was taken or exhibits filed; no evidence of any kind was introduced.<sup>3</sup> The request for a closed

<sup>3</sup> See the testimony of the County Judge, Judge Ruff, in transcript of Bill of Exceptions before the District Judge, Judge Stuart (one of the Respondents here) on October 23, 1975 (JA 60, 64-65). To the same effect, see the testimony of Mrs. Dorothy Kritz, Associate Judge and Clerk of the Lincoln County Court, who was present

preliminary hearing was denied by the County Court that same evening.

On October 22, prior to the preliminary hearing but after the results of the autopsy were made known to the County Attorney, he filed an amended complaint charging that all six murders in the first degree had been committed in conjunction with the perpetration or attempt to perpetrate one or more sexual assaults (JA 19, 87). On that same day, also prior to the preliminary hearing, the County Court entered a prior restraint order "which found that there was *"a reasonable likelihood of prejudicial publicity which would make difficult, if not impossible, the impaneling of an impartial jury in the event the defendant is bound over to the District Court for trial \* \* \*"* (Cert A 1a; emphasis added). The County Court proceeded to impose broad restrictions on all attorneys, parties, witnesses, court personnel and other persons "present in court" during the preliminary hearing, prohibiting them from "releas[ing] or authoriz[ing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing." The County Court also ordered that "no news media disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal

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at the prior restraint hearing on October 21, 1975, and whose statement appears in the same Bill of Exceptions (JA 40-41, 43-44, 50).

<sup>4</sup> The entire order appears in Cert A 1a. See also the Armstrong Affidavit, JA 13-14. The order was rendered orally to the press on October 21 and signed in written form on October 22 (JA 54).

Litigation" (Cert A 2a). (These Guidelines appear in Cert A 4a, 13a).<sup>5</sup>

An open preliminary hearing was held on October 22, at which time testimony was taken from various witnesses which disclosed significant factual information concerning the alleged crimes.<sup>6</sup>

On October 23, Petitioners filed an application with the District Court of Lincoln County, Nebraska, for leave to intervene in the case and for vacation of the County Court's prior restraint order. Counsel for the defendant, again without supporting documentation, moved for continuation of the County Court's order and that all future pre-trial proceedings in the Simants case be closed. The District Court thereupon held an "evidentiary hearing," purportedly restricted to the issues raised by Petitioners and the defendant (JA 52-53). The Clerk of the County Court testified briefly, identifying docket entries and other files in the Simants case and describing the events on the evening of October 21 before the County Court (JA 36-52). The County Judge, Judge Ruff, then took the stand

<sup>5</sup> Excepted from the scope of the County Court's order were: (1) factual statements of the accused's name, age, residence, occupation, and family status; (2) the circumstances of the arrest (time and place, identity of the arresting and investigating officers and agencies, and the length of the investigation); (3) the nature, substance and text of the charge; (4) quotations from, or any reference without comment to, public records or communications theretofore disseminated to the public; (5) the scheduling and result of any stage of the judicial proceeding held in open court; (6) a request for assistance in obtaining evidence, and (7) a request for assistance in obtaining the names of possible witnesses. The court also ordered that a copy of the preliminary hearing proceedings was to be made available to the public at the expiration of the order (Cert A 2a-3a).

<sup>6</sup> See Armstrong Affidavit, JA 14-16.

and was shown fourteen news articles which were marked as Exhibits 4A-N for identification. Two of the exhibits, 4B and 4M, turned out to be the same articles (JA 63). Of the remaining articles, Judge Ruff testified that prior to the entry of his prior restraint order, he had seen or been aware of only three—Exhibits 4C, 4K and 4M (the same as 4B)—although he might also have seen Exhibit 4J (JA 59-64). He admitted that Exhibit 4D, an announcement of the Kellie family funeral services, not only was never relied upon but really had "nothing to do with the case" (JA 62). All of these exhibits were admitted in evidence (JA 64).

Judge Ruff said that he had relied, in entering his order, partly on the three or four articles he had read, that he was aware that the Simants case was attracting national attention from members of the press, that he had spoken to members of his own court about the matter, and that he was generally aware of radio and television publicity (JA 57-60, 64). He was no more specific than that, and he concluded that "the main criteria" he had used was "[c]onversation around the courthouse" (JA 64). Counsel for Petitioners asked:

Q And, as I understand it, there was absolutely no evidence offered at the [October 21 prior restraint] hearing.

A [Judge Ruff] At the hearing, that's right.

Q And you based your findings in your order solely upon what you had read in the newspapers, and what you had seen on TV, and what you had heard on the radio and statements of counsel.

A Primarily statements of counsel.



Q Which were not of record.

A Which were not of record, that's correct. [JA 65.]

The District Court thereupon granted Petitioners' motion to intervene, denied defense counsel's motion to close any future pretrial District Court proceedings, and adopted as its own on an interim basis the County Court's restrictive order.

On October 27, without a further hearing and without the introduction of further evidence of any kind, Judge Stuart terminated the County Court's order and substituted his own, which he read in open court before the press and the public (JA 17, 73-76). Judge Stuart found "*because of the nature of the crimes charged* in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial" (Cert. A 9a; emphasis added). The court cited no source and no evidence for this conclusion. It did not refer, for example, to Judge Ruff's testimony or to the news articles previously introduced in evidence. Instead, the court appeared to rely entirely upon "the nature of the crimes charged."

The court adopted the aforementioned Nebraska Bar-Press Guidelines as "clarified" by the court in its order. The District Court held as follows:

1. It is hereby stated the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing, is "pre-trial" publicity.<sup>171</sup>

<sup>171</sup> As pointed out *infra*, the order, despite its designation by the court, not only was a "pre-trial" order but also was an order enforced after commencement of the trial.

2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it.

3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported.

4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at careful discretion of the press. The testimony of this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.

5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported.

6. The exact nature of the limitations of publicity ~~as~~ entered by this order will not be reported.<sup>172</sup> That is to say, the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against

<sup>172</sup> This provision was inserted even though, as noted *supra*, the court had already read the entire order, including its references to a confession, statements against interest and sexual assaults, in open court before the press and the public (JA 17, 73-76).

interest, witnesses or type of evidence to which this order will apply will not be reported. [Cert A 10a-11a.\*]

On October 31, Petitioners sought relief from the District Court's order after having abided by the various orders of both the County and District Courts for nine days. Petitioners sought a stay from the District Court of its order and at the same time sought from the Supreme Court of Nebraska immediate relief, by way of mandamus, stay, and/or expedited appeal, from the District Court's order (JA 99-116). Upon the failure of both the District Court and the Supreme Court of Nebraska to act on the requested relief, Petitioners filed an application on November 5 with this Court (directed to Mr. Justice Blackmun, as Circuit Justice) which sought a stay of the District Court's order. In response to the November 5 application by the Petitioners and in order to avoid exercising what it considered to be "parallel jurisdiction" with this Court, the Supreme Court of Nebraska issued a *per curiam* memorandum on November 10 in which that court declined to take any action on the Petitioners' writ of mandamus pending before it until such time as this Court made known whether it would accept jurisdiction in the matter (Cert A 19a).

On November 13, Mr. Justice Blackmun, acting in his capacity as Circuit Justice, issued an In Chambers opinion in which he declined to act finally on the Petitioners' application for a stay of the District Court's order "[o]n the expectation, which I think is now clear and appropriate for me to have, that the Supreme

\* That part of the District Court's order relating to the physical accommodations to be accorded the press in the courtroom was not contested by Petitioners and is not now contested.

Court of Nebraska, forthwith and without delay, will entertain the petitioners' application made to it, and will promptly decide it in the full consciousness that 'time is of the essence' " (Cert. A 21a, 28a). In so ruling, Mr. Justice Blackmun noted that "if no action on the petitioners' application to the Supreme Court of Nebraska could be anticipated before December 1, \* \* \* a definitive decision by the State's highest court on an issue of profound constitutional implications, demanding immediate resolution, would be delayed for a period so long that the very day-by-day duration of that delay would constitute and aggravate a deprivation of such constitutional rights, if any, that the petitioners possess and may properly assert. Under these circumstances, I would not hesitate promptly to act" (Cert A 27a). Mr. Justice Blackmun reserved the right to Petitioners "to reapply to me should prompt action not be forthcoming" (Cert A 28a).

On November 18, the Supreme Court of Nebraska set November 25 as the date on which it would hear Petitioners' arguments on their request for mandamus and on the substantive questions surrounding the constitutional validity of the District Court's order (Cert A 29a). Also on November 18, Petitioners, pursuant to the November 13 ruling of Mr. Justice Blackmun, renewed their application for a stay.

On November 20, Mr. Justice Blackmun granted Petitioners a partial stay of the District Court's order after concluding that the Supreme Court of Nebraska's delay in rendering a definitive decision exceeded "tolerable limits" (Cert A, 35a, 36a). As Mr. Justice Blackmun observed in his In Chambers opinion:

\* \* \* [E]ach passing day may constitute a separate and cognizable infringement of the First

Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable. By deferring action until November 25, and possibly later, the Supreme Court of Nebraska has decided, and, so far as the intervening days are concerned, has finally decided, that this restraint on the media will persist. In this sense, delay itself is a final decision. [Cert A 37a.]

In granting a partial stay, Mr. Justice Blackmun made, *inter alia*, the following rulings:

(1) That portion of the District Court's order which generally incorporated the aforementioned Nebraska Bar-Press Guidelines was stayed by reason of the fact that the Guidelines

are merely suggestive and accordingly, are necessarily vague. \* \* \* I find them on the whole \* \* \* sufficiently riddled with vague and indefinite admonitions—understandably so in view of the basic nature of “guidelines”—that I have concluded that the best and momentary course is to stay their mandatory and wholesale imposition in the present context. The state courts, nonetheless, are free forthwith to reimpose particular provisions included in the Guidelines so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately specific and in keeping with the remainder of this order. [Cert A 38a-39a.]

(2) Paragraphs 4 and 5 of the District Court's order were stayed by Mr. Justice Blackmun since:

No persuasive justification has been advanced for those parts of the restrictive order that prohibit the reporting of the details of the crimes, of

the identities of the victims, or of the testimony of the pathologist at the preliminary hearing that was open to the public. \* \* \* These facts in themselves do not implicate a particular putative defendant. \* \* \* [U]ntil the bare facts concerning the crimes are related to a particular accused, it does not seem to me that their being reported in the media irreparably infringes the accused's right to a fair trial of the issue as to whether he was the one who committed the crimes. There is no necessary implication of the person, who has been named as the accused, in the facts suppressed by paragraphs 4 and 5 of the District Court's restrictive order. \* \* \* [Cert A 39a-40a.]

(3) The restraints in the District Court's order on other aspects of pretrial publicity were not prohibited by Mr. Justice Blackmun, “at least on an application for a stay and at this distance \* \* \*” (Cert A 40a). Observing that “[r]estrictions limited to pretrial publicity may delay media coverage” but that “at least they do no more than that,” Mr. Justice Blackmun concluded that “certain facts that strongly implicate an accused may be restrained from publication by the media prior to his trial. A confession or statement against interest is the paradigm” (Cert A 40a). Other facts which are possibly implicative of the accused—*e.g.*, “those associated with the circumstances of his arrest,” “facts associated with the accused's criminal record, if he has one;” “[c]ertain statements as to the accused's guilt by those associated with the prosecution”—were held to be potentially proper subjects for restraint prior to the trial if the burden of proof set forth by Mr. Justice Blackmun was satisfied (Cert A 41a). That burden, he said, was whether “publicizing particular facts will irreparably impair the



ability of those exposed to them to reach an independent and impartial judgment as to guilt" (*id.*).

Mr. Justice Blackmun concluded his November 20 ruling by noting that the Supreme Court of Nebraska "may well conclude that other portions of that order are also to be stayed or vacated" (Cert A 42a).

On November 21, the Petitioners filed a motion with all Justices of this Court to vacate so much of Mr. Justice Blackmun's November 20 order as had not stayed the imposition on the press of any prior restraint on publication.

On November 25, the Supreme Court of Nebraska heard oral argument upon the Petitioners' request for a stay of the District Court's order. On December 1, the Supreme Court of Nebraska issued a *per curiam* opinion. Two judges dissented on the ground that this Court's actions had displaced any jurisdiction in the Nebraska Supreme Court, and two other judges, although agreeing with this view, joined the opinion of the final three judges solely in order to avoid what would otherwise have been a procedural deadlock. The final three judges, who were thus joined by the two concurring judges, held as follows:

We conclude that the order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon the freedom of the press. The guidelines were not intended to be contractual and cannot be enforced as if they were.

The order of the District Court of October 27, 1975, is vacated and is modified and reinstated in the following respects: It shall be effective only as to events which have occurred prior to the re-

lease of this opinion, and only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interests made by the accused to law enforcement officials. (2) Confessions or admissions against interests, oral or written, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings. [Cert A 63a-64a.]

*third parties, excepting any statement, if any, made by the accused to*

The Supreme Court of Nebraska also remanded the defendant's request for all future pretrial proceedings to be closed to the District Court with instructions to consider such applications in the future in accord with A.B.A. Fair Trial and Free Press Standard 3.1: Pretrial Hearings, which the Court incorporated and adopted in its opinion (Cert A 64a-65a).

On December 4, Petitioners applied to this Court for a stay of the Supreme Court of Nebraska's order and further moved this Court to treat their previously-filed papers as a Petition for a Writ of Certiorari. On December 8, this Court denied without prejudice the Petitioners' motion of November 21 which sought to vacate in part Mr. Justice Blackmun's November 20 stay order inasmuch as that order had expired on December 1, the date of the Supreme Court of Nebraska's order. This Court granted Petitioners' motion to treat the previously-filed papers as a Petition for a Writ of Certiorari, consideration of which was deferred until additional papers were received by this Court or until the close of business on December 9; consideration was also deferred of the application for stay of the order of the Supreme Court of Nebraska (Cert A 70a). (Justices Brennan, Stewart and Marshall would have granted the latter application.)

On December 12, this Court granted the Petition for a Writ of Certiorari; denied the motion to expedite (Justices Brennan, Stewart and Marshall dissenting); denied the application for a stay (Justices Brennan, Stewart and Marshall dissenting in whole; Justice White dissenting with respect to the publication of information disclosed in public at the preliminary hearing in the *Simants* case); and invited the submission of an amended Petition for a Writ of Certiorari (Cert A 71a), which was filed with the Court on December 24, 1975.

**(b) Post-certiorari Matters**

Since this Court granted the Petition for a Writ of Certiorari herein on December 12, 1975, the underlying criminal case of *State v. Simants* has proceeded through the trial, with the defendant having been found guilty by the jury of six counts of murder in the first degree. We bring to this Court's attention for informational purposes only certain matters relating to the *Simants* case that have occurred since the granting of certiorari.

On December 23, 1975, the defendant, a Respondent in this Court, filed in the District Court (a) an application for a change of venue to another county; (b) a motion to sequester the jury; (c) a motion for restricted voir dire, so that no more than four members of the prospective jury could be voir dired at any one time, with the others sequestered; and (d) a motion to close to the press and the public all hearings prior to the time of the trial scheduled for January 5, 1976.<sup>10</sup>

<sup>10</sup> On December 24, the defendant served notice that one of his defenses would be insanity or mental derangement.

On December 29, Petitioners requested permission to enter an appearance in the criminal case in opposition to the defendant's motion to close the pre-trial hearings, and to file a pleading and brief in opposition thereto. The defendant opposed the applications, and the District Court denied Petitioners the right to appear, argue or file supporting papers. The District Court ordered no further participation by the Petitioners or their counsel in any form in the criminal case.

Immediately thereafter, the District Court denied the defendant's application for a change of venue, granted his motion to sequester the jury, granted the motion for a restricted voir dire of prospective jurors, and denied the defendant's motion to close the pre-trial hearings. Immediately thereafter, defense counsel moved to close the court for a *Jackson v. Denno* hearing. The court granted the motion, directed that everyone but officers of the court leave the courtroom, and then proceeded to conduct a closed *Jackson v. Denno* hearing. Petitioners requested a stay of the District Court's order closing the *Jackson v. Denno* hearing, but the stay was denied.

On January 2, 1976, the defendant filed a motion to close the voir dire portion of the trial to the press and the public. Three days later, Petitioners filed a declaratory judgment action against the State and *Simants* with respect to the constitutionality of closing pre-trial and trial proceedings, sought a stay and an injunction against such closing, and moved for an immediate hearing and expedited proceedings. (This suit is still pending in the Lincoln County District Court.) The District Court consolidated these matters with the criminal case. It then denied all relief sought by the Petitioners and granted the defendant's motion



to close the voir dire portion of the trial, ruling that the voir dire constituted a pre-trial matter and that the trial did not start until the formal swearing in of the twelve qualified jurors.<sup>11</sup>

The defendant pleaded not guilty by reason of insanity, and the voir dire proceeded. Of the 19 prospective jurors examined that day, 11 were passed for cause, seven excused for cause other than pre-trial publicity, and one temporarily excused and ordered to return the next day for further examination. At the conclusion of the voir dire on January 5, the District Court reversed its earlier order and opened the jury selection process to the press and public, saying:

Having profited from the first day's voir dire and listened to the questions that have been asked of the prospective jurors, I have not observed any questions asked that I feel could prejudice other jurors disproportionately with the disadvantages of the obvious extreme measures that are involved in closing the voir dire examination to the members of the general public and the members of the press. And so, at this time I do change the order that I entered this morning and will allow members of the press and members of the public to attend the remainder of the voir dire. However, prior to their admission to the courtroom, I will ask the members of the press to report to me in chambers in order that we may further emphasize the admonitions against the violation of the bar press guidelines.

On January 6, the District Court met with members of the press. After noting that "In my opinion there is a very strong case against the defendant here," Judge Stuart said he had three areas of concern in

<sup>11</sup> See n. 21, *infra*.

regard to reporting the voir dire. He asked if members of the press had any problem with his request not to publish, making clear that only those agreeing to his conditions would be allowed in the courtroom. All newsmen present determined that they could not abide by the conditions, and they were thereupon excluded from the voir dire, which continued for the balance of the day. Voir dire was completed on January 7, the jury was impanelled, and the trial proceeded to conclusion on January 17. During this period all of the information previously prohibited from being published was received in evidence, a substantial portion of it being testified to by witnesses for the defense.

We agree, of course, with the implicit decision already made by this Court<sup>12</sup> that the instant case has not been mooted by the expiration of the Nebraska Supreme Court's order. The case is a classic example of the *Southern Pacific* exception to the mootness doctrine: it involves "short term orders, capable of repetition, yet evading review \* \* \*." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).<sup>13</sup> This exception to the mootness doctrine has recently received recognition in *Weinstein v. Bradford*, 44 U.S. L.W. 3372 (U.S. Dec. 16, 1975), and *Sosna v. Iowa*, 419 U.S. 393 (1975): there is no mootness if the challenged action is too short in duration to be fully litigated prior to its expiration, and there is a reasonable likelihood that the same parties could be subjected to

<sup>12</sup> The Court, with full recognition that the Simants trial was imminent (see Petitioners' applications to this Court to vacate part of Mr. Justice Blackmun's November 20 order and to treat ~~the~~ previously filed papers as a Petition for a Writ of Certiorari), denied Petitioners' motion to expedite and application for a stay, and set the case for argument in the ordinary course.

<sup>13</sup> See also *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125-126 (1974); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974).



the same action again. That is precisely the situation here.

It is clear that unless a decision is reached now with respect to the constitutionality of prior restraints against the publication of news, this Court will be confronted with a plethora of such cases<sup>14</sup>—invariably arising in the context of hastily briefed motions for a stay which, by their terms, expire quickly enough to raise serious questions of mootness. In addition, lower courts will continue to be confused and at odds with each other over the constitutionality of prior restraint orders.<sup>15</sup>

The exception to normal ~~the~~ mootness doctrine is especially applicable where First Amendment rights are

<sup>14</sup> This is the third case to reach the Court within two years involving the constitutionality of prior restraints imposed on the press with respect to its reporting about judicial proceedings. In this case, as in *Times-Picayune Pub. Corp. v. Shulinkamp*, 419 U.S. 1301 (1974), and *Newspapers, Inc. v. Blackwell*, 421 U.S. 997 (1975), the case came before the Court on a motion for a stay, thus presenting the Court with what Mr. Justice Blackmun has referred to as "an issue of profound constitutional implications, demanding immediate resolution \* \* \*" (Cert. A 27a).

<sup>15</sup> Mr. Justice Blackmun's In Chambers decision of November 20, although apparently mooted (see Cert A 70a) by the subsequent December 1 decision of the Nebraska Supreme Court, has already begun to be relied upon by lower courts as a ground for the entry of orders directly restraining the press from publishing news. See, e.g., *People v. Carson*, Indict. No. 4296-73, King's Co. N.Y. Crim. Term 1976, January 15, 1976, transcript pp. 575-576 (media prohibited from publishing certain information about defendant during trial); *Nebraska v. Shonka*, Dist. Ct. of Butler Co., Neb., Docket 26, p. 32, November 24, 1975, transcript p. 13 and order entered November 26, 1975, Par. 4 (media prohibited from publishing certain information about defendant prior to trial).

In addition, see generally the Press Censorship Newsletters Nos. I-VIII published by the Legal Defense and Research Fund of the Reporters Committee for Freedom of the Press, Washington, D.C.

at stake. In *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), this Court struck down a state court order restraining for ten days the members of the National States Rights Party from holding a public assembly, even though the order had long since expired. Similarly, the Court of Appeals for the Third Circuit reached and decided the merits of a restrictive order notwithstanding the fact that it had lapsed in *United States v. Schiavo*, 504 F.2d 1 (1974) (*en banc*), *cert. denied*, 419 U.S. 1096 (1975), holding that "this case is reviewable as a dispute 'capable of repetition, yet evading review,'" and citing *Southern Pacific*. The same rulings are appropriate in this case.

#### SUMMARY OF ARGUMENT

There need be no conflict between First and Sixth Amendment rights in a case of this kind, because courts have available to them a whole range of methods to protect a criminal defendant from the possibly adverse effects of publicity concerning his case. As we show in Part I of our Brief, these methods range from change of venue and continuance to voir dire and sequestration. But, as this Court taught in the *Sheppard* case, they do *not* include direct prior restraints on the press. Such restraints are not only constitutionally void but unnecessary, because jurors, properly screened and instructed after the application of the protective measures referred to above, are fully capable of reaching independent judgments based on the evidence introduced at trial. The supposition that the type of publicity generated by this case—factual and performed in the public interest—is necessarily going to prevent a jury from being impartial is simply unsupportable.

In any event, as we show in Part II, this Court has made clear on a number of prior occasions that regardless of what the system may be in other countries, our First Amendment does not allow one branch of government, the judiciary, to dictate to the press, in advance of publication, what information will and will not reach the public. If there is an exception to this otherwise absolute rule, it is only that: a single, narrow exception, totally inapplicable to the facts of this case. By engaging in a balancing of interests, and by misinterpreting a single dictum in one of this Court's opinions, the Nebraska Supreme Court has stood the First Amendment on its head and made the publication of news depend upon what any given court may decide would be detrimental to a defendant at some future point in time. Not only this Court's rulings, but events over the last half century in other parts of the world, teach us that this can be the fatal first step in the censorship, subjugation or destruction of a free press.

Finally, regardless of what criteria or formulae are applied in this case, the Nebraska prior restraint order cannot be upheld. This is so, as we demonstrate in Part III, because the evidence of record, the findings made and the standards applied are totally insufficient to justify a prior restraint of any kind. The record simply will not support the conclusion reached.

#### ARGUMENT

It is now a truism, in Mr. Justice Black's much repeated phrase for this Court, that "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges v. California*, 314 U.S. 252, 260

(1941). This case requires no such trying choice. It poses no problem as to when, if ever, the press may be held liable in contempt for publishing material, *Craig v. Harney*, 331 U.S. 367, 373 (1947); it raises no question as to the extent to which attorneys and others may be barred from speaking with the press, *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975); and it does not deal with the question of whether the press, in performing its news gathering functions, has any greater rights than the general public. See *Branzburg v. Hayes*, 408 U.S. 665 (1972).<sup>16</sup>

This is a prior restraint case. It involves a judicial bar which lasted in one form or another for over ten weeks—from October 22, 1975 until January 7, 1976—on the reporting of news by Petitioners, part of the Nebraska news media. As such, the case relates to what has long been acknowledged to be the core of the First Amendment. As summarized by Professor Bickel in his final book, "[p]rior restraints fall on speech, with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact of speech. \* \* \* Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech."<sup>17</sup>

A part of what is involved in this case is reporting with respect to publicly-attended court proceedings and court files open to the public. The uncontested

<sup>16</sup> Indeed, it is apparently the view of the Nebraska Supreme Court that the press has fewer First Amendment rights than the members of the public generally, none of whom has been subject to the prior restraint here at issue (see Cert A 57a-58a, 64a).

<sup>17</sup> Bickel, *The Morality of Consent* 61 (1975).



affidavits submitted to the Nebraska courts demonstrate that most if not all of the information which Petitioners were enjoined from publishing is information that either was publicly testified to in open court during a preliminary hearing or was contained in documents on public file with the Nebraska courts. As to all such information, the never modified or limited language of this Court in *Craig v. Harney, supra*, 331 U.S. at 374, would appear to be dispositive:

A trial is a public event. What transpires in the court room is public property. \* \* \* Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Again, in *Estes v. Texas*, 381 U.S. 532, 541-542 (1965), this Court observed that “\* \* \* reporters of all media \* \* \* are plainly free to report whatever occurs in open court through their respective media.”

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), even though the vehicle for suppression of news was a suit for damages *after* publication rather than the more restrictive and onerous prohibition against publication *prior* to the event, the Court nevertheless struck down the judgment against the press. The publication of the name of a rape victim in advance of a criminal trial could not be made the basis for damages because, as the Court reiterated time and again,<sup>18</sup> the name of the victim had already been made part of the public court record in advance of that crim-

<sup>18</sup> *Id.* at 473, 491, 492, 494, 495, 496.

inal trial. “Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it” (*id.* at 496). The reason is clear: the press, by publishing, is merely giving further publicity to information that is already public (*id.* at 494). “The commission of a crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions \* \* \* are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government” (*id.* at 492). “By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby served” (*id.* at 495).<sup>19</sup>

The same point was made in slightly different form in *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In explaining why it was so important for the press to provide information about the judicial process, the Court said:

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media. \* \* \* [*Id.* at 350.]

<sup>19</sup> The Court should note that all of the records from which Petitioners received information in the instant case had also been made public by the prosecution.



So unequivocal have the opinions of this Court been on this subject that the Court of Appeals for the Fifth Circuit could, in *United States v. Dickinson*, 465 F.2d 496, 507 (5th Cir. 1972), correctly summarize this Court's prior rulings by saying that:

\* \* \* [O]ne significant circumstance is readily apparent—no decision, opinion, report or other authoritative proposal has ever sanctioned by holding, hint, dictum, recommendation or otherwise any judicial prohibition of the right of the press to publish accurately reports of proceedings which transpire in open court. [Footnote deleted.<sup>20</sup>]

If that were all that was involved in this case (and it is most of what is involved), we would respectfully suggest to the Court that summary reversal of the Nebraska Supreme Court opinion would be in order.

But the injunction of the Nebraska Supreme Court swept beyond its patently unconstitutional bar on the reporting of that which had already been observed in open court or in open files. It totally barred, until the jury was sworn,<sup>21</sup> any publication of:

<sup>20</sup> For a subsequent ruling adhering to the prior decision on the issue of contempt, see *United States v. Dickinson*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973).

<sup>21</sup> As already noted, the District Court apparently took the position that trial did not commence until the jury was sworn and that therefore its prior restraint was entirely a "pre-trial" order. This was error. It is abundantly clear in American law that the trial begins when the potential jurors are first gathered for the selection of a final panel. *E.g.*, *Lewis v. United States*, 146 U.S. 370 (1892); *Hopt v. Utah*, 110 U.S. 574 (1884); *Pointer v. United States*, 151 U.S. 396 (1894); *Echert v. United States*, 188 F.2d 336 (8th Cir. 1951); *Scott v. State*, 113 Neb. 657, 204 N.W. 381 (1925); *Ward v. Territory*, 8 Okla. 12, 56 Pac. 704 (1899); *State v. Carver*, 94 Idaho 677, 496 P.2d 676 (1972).

- (1) Confessions or admissions against interest made by the accused to law enforcement officials.
- (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statement, if any, made by the accused to representatives of the news media.
- (3) Other information sharply implicative of the accused as the perpetrator of the slayings. [Cert A 64a.]

Insofar as such information was obtained from open court proceedings or files, we submit that its publication is clearly protected from prior restraint by the cases referred to above. However, the Nebraska prohibition is so broad that it would appear also to cover information which Petitioners received from third parties during the normal course of their coverage of the Simants judicial proceedings. To that extent, it will require further comment. First, however, we demonstrate that there are ample means, short of any possible intrusion on First Amendment rights, to fully protect a defendant's Sixth Amendment rights.

## I.

### Sixth Amendment Rights May Be Fully Protected Without the Imposition of Prior Restraints on the Press

The Nebraska courts start from the premise that there is necessarily a conflict between the press's right to publish under the First Amendment and the defendant's right to a fair trial under the Sixth, and that given such a conflict, the First Amendment must yield. This attitude not only permeates the December 1 opinion of the Nebraska Supreme Court but was perhaps most starkly stated by the County Court on October 22: "When these rights come into conflict, then the right of free press must be subservient to the right

of due process" (JA 90). We believe this premise to be the first error of the Nebraska courts, and one that underlies much of the bad law that thereafter developed at each step of the way.

The concept that a defendant can receive a fair trial only by the suppression of news is not only insupportable but directly contrary to the teachings of this Court.

Except in the most exceptional case, carefully selected jurors are fully able to exercise their independent judgment of guilt or innocence based on the evidence introduced in court, whether or not they have read or heard about the case beforehand. This is attested to both by individual example and by studies. Perhaps the most obvious recent example is the trial of former Attorney General John Mitchell in New York City, where he was acquitted despite a continuous, long-lasting and pervasive barrage of pre-trial publicity. Several recent studies have cast great doubt upon the degree to which the media actually affect potential jurors.<sup>22</sup> Indeed, the most complete study of the jury system of which we are aware concludes that:

<sup>22</sup> E.g., Simon, "Murder Juries and the Press," *Transaction* (May-June 1966); Kline and Jess, "Prejudicial Publicity: Its Effect on Law School Mock Juries," 43 *Journ.Quart.* 113 (1966). As summarized in Gillnor, "Free Press v. Fair Trial: a Continuing Dialogue. Trial by Newspaper and the Social Sciences," 41 *N.Dak. L.Rev.* 156, 171 (1964):

If a tentative conclusion may be ventured at this point, it is that there is no empirical evidence to support the view that extensive, or even irresponsible, press coverage of a court case destroys the ability of jurors to decide the issue fairly.

The following press release dated December 24, 1975, from the News Bureau of Marquette University in regard to a study conducted by a psychology professor bears upon this point.

Pre-trial publicity may not be a factor in influencing potential

\* \* \* contrary to an often voiced suspicion, the jury does by and large understand the facts and get the case straight [and that] the juror's decision by and large moves with the weight and direction of the evidence. [Kalven and Zeisel, *The American Jury* (Phoenix Ed. 1971).]

Thus, in *Murphy v. Florida*, 421 U.S. 794 (1975), where several jurors had heard about the defendant's

jurors in a criminal trial, according to a Marquette University psychology professor.

Assistant Professor Harry E. Rollings used the Patty Hearst case recently as a model in an introductory psychology course to determine whether newspaper and broadcast accounts of the case influenced the attitudes of Marquette students. Rollings, who specializes in industrial psychology, designed the survey with James J. Blascovich, Assistant Professor of Psychology.

Rollings developed a series of questions about the prosecution of Hearst, the daughter of publisher William Randolph Hearst who faces charges from a Los Angeles County Grand Jury of robbery, kidnapping, and assault. He presented the questions to 438 students the day following her arrest and again one month later. The second survey followed several weeks of publicity regarding brainwashing as a possible defense for Hearst.

In both surveys the students were asked whether they believed Hearst was brainwashed and what they thought her sentence would be. There was no substantial difference in the students' answers in the surveys, Rollings said, despite widespread media coverage of the brainwashing theory. Only nine percent in the first survey and eight percent in the second said they believed Hearst was brainwashed, he said.

In regard to sentencing, no substantial change in attitudes was noted, he said. Over two-thirds of the students in both surveys predicted some type of prison sentence for Hearst and co-defendants William and Emily Harris. The average length of sentence predicted was seven years for Hearst and 17 and 14 years respectively for the Harrises. About 25 percent of the students indicated in both surveys that Hearst would receive only probation. \* \* \*



past crimes, this Court nevertheless affirmed the guilty verdict, noting that:

\* \* \* exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged [does not] alone presumptively deprive the defendant of due process. [*Id.* at 799.<sup>23</sup>]

And in *Irvin v. Dowd*, 366 U.S. 717, 723 (1961), the Court said:

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Finally, in *Calley v. Callaway*, 519 F.2d 184, 210 (5th Cir. 1975), the court made these very salient comments:

If, in this age of instant, mass communication, we were to automatically disqualify persons who have heard about an alleged crime from serving as a juror, the inevitable result would be that truly heinous or notorious acts will go unpunished. The law does not prohibit the informed citizen from participating in the affairs of justice. In prominent cases of national concern, we cannot allow widespread publicity concerning these matters to paralyze our system of justice.

Moreover, there are ample methods, short of suppression of news, for making certain that jurors are

<sup>23</sup> See also *Beck v. Washington*, 369 U.S. 541, 555-558 (1962); *Sheppard v. Maxwell*, *supra*.

protected from any preconceived bias or prejudice. The entire point of the *Sheppard v. Maxwell* discussion was to set forth a variety of methods, *excluding* prior restraints, by which jurors could be insulated from possible prejudicial publicity. The means were varied. *Sheppard* itself had involved a situation in which "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard" (384 U.S. at 355). In response to this, the Court suggested strict rules governing the use of and movement in the courtroom by the media so as to prevent a carnival atmosphere. Also suggested were the adoption of moves to insulate witnesses from excessive press exposure; control of releases by police officers, witnesses and counsel; admonitions to the jury to disregard media coverage; the use of *voir dire* to insure avoidance of prejudice to defendants; changing the venue of trials; continuances; sequestration; and finally, where necessary, new trials.<sup>24</sup>

<sup>24</sup> We do not, in this brief, deal with the constitutional validity of orders to witnesses, parties and the like not to make statements to the media. There are surely significant constitutional limits on the power of courts to limit the comments of attorneys and others. See *Chicago Council of Lawyers v. Bauer*, *supra*. There is also substantial doubt as to the constitutionality of suppressing at all the right of an accused in a criminal case to speak publicly about his case. See Barist, "The First Amendment and Regulation of Prejudicial Publicity—An Analysis," 36 *Fordham L.Rev.* 425, 443 (1968); Royster, "The Free Press and a Fair Trial," 43 *N.C.L.Rev.* 364 (1965).

In this regard, note Judge Murray's comment in *United States v. Mandel*, D.C. Md., Crim. No. HM75-0822, December 19, 1975, wherein he denied an order forbidding the parties to speak to the press about a pending criminal proceeding: "• • • it seems to the Court that to impose the restrictions on the speech of all individuals connected with the case as contemplated by the order would inhibit



Each of the methods described above, and all of them, have been used by courts to insure the impartiality of jurors. Judges may, and, of course, should, provide cautionary instructions to jurors in an effort to insulate them from the possible effects of publicity. In other circumstances, such instructions are deemed sufficient to protect a defendant from the possibility of jurors improperly using evidence admitted for one purpose for another prohibited one. For example, jurors are instructed with respect to the limited evidentiary value of materials before them, *United States v. McIntosh*, 426 F.2d 1231 (D.C. Cir. 1970); jurors are instructed as to the admissibility of confessions introduced as to other defendants, *United States v. Leviton*, 193 F.2d 848, 856 (2d Cir. 1951), *cert. denied*, 343 U.S. 946 (1952); jurors are given instructions as to conclusions not to be drawn from the invocation of the Fifth Amendment privilege, *United States v. Kilpatrick*, 477 F.2d 357 (6th Cir. 1973); and jurors are advised not to apply a guilty plea of one defendant to another, *United States v. Davis*, 487 F.2d 112 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974).

All these instructions are sophisticated ones. They require serious, even dedicated, efforts by jurors to abide by them. After the receipt of such instructions jurors are presumed under our system of justice competently to apply the instructions as given and to make judgments based only on the facts and law as limited by the instructions given them. *See, e.g., Blumenthal v. United States*, 332 U.S. 539, 552-553 (1947). And

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press coverage to almost the same extent as a restriction laid directly upon the publishers of news" (slip. op. 4).

We emphasize, however, that no such limited orders are involved in this case.

courts do not easily conclude that jurors have failed to abide by the instructions received.

With specific reference to the possibility of prejudicial publicity unfairly affecting the ability of a jury to decide a case on the evidence presented to it, a trial judge may, as *Sheppard* suggests, use the *voir dire* to ascertain the effect of publicity. *Voir dire* has been recognized and utilized by the courts as an effective device for uncovering juror bias. As far back as *United States v. Burr*, 25 Fed. Cas. 49, 51 (Cas. No. 14,692g) (1807), Chief Justice Marshall laid down standards by which jurors might be questioned as to their impartiality in the face of widespread pretrial publicity. *See also, United States v. Callender*, 25 Fed. Cas. 239, 244 (Cas. No. 14,709) (1800).

This Court has frequently indicated its confidence in the effectiveness of *voir dire*. *See, e.g., Ham v. South Carolina*, 409 U.S. 524 (1973). It has referred to the extensive *voir dire* permitted in this country as compared to England, where there is "greater control \* \* \* over pretrial publicity." *Swain v. Alabama*, 380 U.S. 202, 218 n. 24 (1965). And it has, in numerous cases, approved the use of *voir dire* in the specific context of a trial court's ascertaining the effect of pretrial publicity on jurors. *Margoles v. United States*, 407 F.2d 727 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969), illustrates the beneficial effects of the careful supervision of the court in the *voir dire* examination in a case involving alleged prejudicial pretrial publicity.

There then followed more extensive instructions and questions by the court, including a strong, thorough statement on the presumption of innocence. Similar statements were later made by defense counsel. From the responses given by some

of the veniremen, there does not appear to have been any hesitance on their part to answer frankly and candidly. \* \* \*

We hold that the procedures employed by the district court at the *voir dire* examination of prospective jurors were adequate to safeguard petitioner against the effect of prejudicial pre-trial publicity, protected his right to a fair trial, and met the standards set by the Supreme Court and this Court in dealing with similar cases. [*Id.* at 730.]

And in *United States v. Kahaner*, 204 F.Supp. 921, 924 (S.D.N.Y. 1962), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963), Judge Weinfeld wrote:

That a case has been the subject of extensive publication or even comment does not, in and of itself, require automatic continuance of a trial; if that were the rule it would mean that, unless the press voluntarily refrained from continuing publicity, cases involving public officers or public figures could never be brought to trial. The fundamental question remains no matter what the trial date—can a fair and impartial jury be obtained which will decide the issues in the case solely upon the evidence presented in the courtroom? *Whether or not the publicity has been of such a nature that the selection of a fair and impartial jury is foreclosed at this time cannot be determined until jurors are questioned on the voir dire.* [Emphasis added; footnotes deleted.<sup>25</sup>]

<sup>25</sup> For subsequent proceedings, see *United States v. Kahaner*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963).

Trial judges who conduct *voir dire* examinations have broad discretion to assess the impartiality of jurors. *E.g.*, *United States v. De Larosa*, 450 F.2d 1057, 1062 (3d Cir. 1971), *cert. denied*, 405 U.S. 927 (1972); *United States v. Cimini*, 427 F.2d 129 (6th Cir.), *cert. denied*, 400 U.S. 911 (1970); *United States v. Williams*, 496

Both change of venue and continuance are techniques of wide and long-standing acceptance, and are recommended by federal and state case law to mitigate the effects of pretrial publicity.<sup>26</sup> *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Sheppard v. Maxwell*, *supra*; *United States v. Collins*, 472 F.2d 1017 (5th Cir. 1972), *cert. denied*, 411 U.S. 983 (1973); *Commonwealth v. Douglas*, 337 A.2d 860 (Pa. S.Ct. 1975).

Continuance, as the court noted in *United States v. Dioguardi*, 147 F.Supp. 421, 422 (S.D.N.Y. 1956):

\* \* \* serve[s] the practical purpose of enabling the community within the district, which constitutes the reservoir of jurors, to free its judgment from any possible emotional tension [from pre-trial publicity] that may exist.

And as to change of venue, the court in *Pamplin v. Mason*, 364 F.2d 1, 5 (5th Cir. 1966), stated:

\* \* \* [W]here outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.

Similarly, in *Maine v. Superior Court of Mendocino County*, 66 Cal. Rptr. 724, 438 P.2d 372, 377 (1968), the court said:

In many cases that are the focus of unusual public attention, the effect of prejudicial pretrial dislo-

F.2d 383 (1st Cir. 1974); *United States v. Bando*, 244 F.2d 833 (2d Cir.), *cert. denied*, 355 U.S. 844 (1957).

<sup>26</sup> As we have noted, the trial court denied an application in this case for a change in venue; neither the prosecutor nor the defendant requested a continuance, and the court failed to grant one *sua sponte*.



tures or widespread community antagonism can be substantially overcome by a change of venue.<sup>[27]</sup>

Since the order in this case was interpreted and applied by the trial judge to cover not only pre-trial proceedings but the impaneling and final selection of a twelve-person jury, it is relevant to add sequestration to the list of tools available to courts to prevent jury exposure to prejudicial influences arising during trial.<sup>28</sup>

<sup>27</sup> Of course, if all other means of protecting jurors fail, and prejudicial publicity really does prevent a fair trial, the ultimate method of rectifying the situation is a reversal of the criminal conviction. We hasten to point out, however, that such reversals can be avoided in situations in which trial courts adhere to the methods set forth in *Sheppard*. Moreover, we know of no case in which someone has actually gone free because of such a contingency occurring. The Nebraska Supreme Court's opinion seizes upon the reversal concept and suggests that this is too high a price to pay in the interest of avoiding what would otherwise be a conceded intrusion upon the First Amendment freedoms. However, opinions from Justices of this Court make clear that in that extraordinarily rare cases where reversal is the only remedy to avoid the denial of basic constitutional rights, it is not too high a price to pay. See *Rogers v. Richmond*, 365 U.S. 534, 541 (1961); *Linkletter v. Walker*, 381 U.S. 618, 650 (1965) (Black, J., dissenting); *Olmstead v. United States*, 277 U.S. 438, 469-470 (1928) (Holmes, J., dissenting).

<sup>28</sup> See also *People v. Hagel*, 32 Ill.2d 413, 206 N.E.2d 699, 701, cert. denied, 382 U.S. 942 (1965); Stanga, "Judicial Protection of the Criminal Defendant Against Adverse Press Coverage," 13 Wm. & Mary L.Rev. 1, 23-29 (1971); *Sheppard v. Maxwell*, supra, 384 U.S. at 353. In upholding a trial court's employment of the sequestration device over the objection of the defendant, the Court of Appeals for the Seventh Circuit observed:

It is quite clear to us, as it was to the trial court, that because of the local prominence of defendant, the problem of adverse newspaper and other publicity was to be an important factor in defendant's trial strategy. This was a proper element for defendant to consider. It is equally apparent to us that the trial court's decision to sequester the jury, designed as it was to insulate the jurors from local prejudice, was a sound exer-

The use of the court's power to sequester juries has been judicially approved as a "commendable procedure" (*Wansley v. Miller*, 353 F. Supp. 42, 50 (E.D. Va.), rev'd on other grounds sub nom. *Wansley v. Slayton*, 487 F.2d 90 (4th Cir. 1973), for just such purposes. Thus, in *Times-Picayune Pub. Corp. v. Schulingkamp*, supra, 419 U.S. at 1308 n.3, Mr. Justice Powell noted that "respondent has indicated his intention to sequester the juries. This will protect against many of the hazards that the selective restrictions on reporting during trial are designed to prevent."

We emphasize again that the methods suggested in *Sheppard* for the protection of the defendant's Sixth Amendment rights do *not* include the exclusion of the press from the courtroom at either trial or pre-trial stages—the latter having been suggested in the decision of the Supreme Court of Nebraska. That *Sheppard* omitted any such suggestion is not surprising in light of the Sixth Amendment mandate concerning public trial.<sup>29</sup> Indeed, Mr. Justice Black in *In re*

cise of its discretion. [*United States v. Holovachka*, 314 F.2d 345, 352 (7th Cir.), cert. denied, 379 U.S. 809 (1963); citations omitted.]

<sup>29</sup> In *Oxnard Publishing Co. v. Superior Court*, 68 Cal.Rptr. 83, 94-95 (Ct.App. 2d Dist. 1968), the court noted:

That case, however, contains no suggestion that criminal trials, or parts of trials, should be conducted in closed session. None of the remedies it advances for the control of prejudicial publicity—sequestration of the jury, continuance of the trial, change of venue, directions to the jury not to read or listen to news reports, insulation of witnesses, control of the release by participants of information to the press—implies any abandonment of the tradition of public trial. Indeed the opinion seems to emphasize the contrary, when in discussing the control of trial publicity it declares that it should have been the aim of



*Oliver*, 333 U.S. 257 (1948), speaking of the right to public trial, was able to state for the Court that in addition to the Federal Constitution, "[t]oday almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public" (*id.* at 267-268; footnotes deleted). And that:

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. [*Id.* at 268-270; footnotes deleted.<sup>30</sup>]

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the trial court to induce the reporting of the case "as it unfolded in the courtroom—and not as pieced together from extrajudicial statements." [Citation omitted.]

<sup>30</sup> Contained in Mr. Justice Black's historical analysis of the right to public trial is a footnote stating:

"No court has gone so far as affirmatively to exclude the press." Note, 35 Mich. L. Rev. 474, 476. Even those who deplore the sensationalism of criminal trials and advocate the exclusion of the general public from the courtroom would preserve the rights of the accused by requiring the admission of the press, friends of the accused, and selected members of

Thus, while that portion of the decision of the Supreme Court of Nebraska relating to the closing of pretrial hearings at the request of a defendant is not squarely before the Court, we do urge that this Court, in its consideration of the appropriate methods to avoid the potential harm to the Sixth Amendment rights of defendants, not adopt or encourage limitations on the right of the press and the public to attend pre-trial hearings.<sup>31</sup>

Finally, a variety of studies subsequent to *Sheppard* strongly support the utilization of the means discussed herein to protect Sixth Amendment rights; none suggests or appears to believe that prior restraints on the press are either constitutional, wise or required as a method of "accommodating" both Amendments. Thus, the Kaufman Report (Report to the Judicial Conference of the United States on the Operation of the Jury System) on the "Free Press-Fair Trial" issue concluded:

The Committee does not presently recommend any direct curb or restraints on publication by the press of potentially prejudicial material. Such a curb, it feels, is both unwise as a matter of policy and poses serious constitutional problems. [Pp. 401-402.]

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the community. Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381, 394-395; 20 J.Am.Jud.Soc. 83. [333 U.S. at 272 n. 29.]

<sup>31</sup> See, e.g., *United States v. Clark*, 475 F.2d 240, 246-247 (2d Cir. 1973); *United States v. Kobl*, 172 F.2d 919 (3d Cir. 1949); *Phoenix Newspapers Inc. v. Jennings*, 107 Ariz. 557, 490 P.2d 563 (1971); Geis, "Preliminary Hearings and The Press," 8 U.C.L.A. L.Rev. 397, 413 (1961).

Similarly, the Medina Report prepared by the Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York (Freedom of the Press and Fair Trial) concluded that prior restraints could and should not be utilized against the press and that:

In sum, our conclusion is that constitutional guarantees would stand in the way of most efforts to regulate the relationship between trials and the media, whether by legislation or by use of the contempt power. And perhaps this is as it should be, for such efforts would embroil the courts in constant conflicts between the courts and the media, which would naturally resist official efforts to restrict their freedom. Such conflicts would not serve to improve the administration of justice but would only estrange those whose common interest should be improvement. This would result in many criminal cases, which are now adversary proceedings between the state and the defendant, also becoming adversary proceedings between the courts and the media, and we cannot believe that this would advance the public interest. Accordingly, because we believe that as a matter of both constitutional law and policy, an approach through legislation or extension of the contempt power is neither feasible nor wise, our recommendations proceed along other lines. [Pp. 10-11.<sup>32</sup>]

The Reardon Report of the American Bar Association, Standards Relating to Fair Trial and Free Press (1966) (the ABA Legal Advisory Committee on Fair Trial and Free Press) similarly did not recommend any use of prior restraints against the press under any

<sup>32</sup> For Judge Medina's more current views reaching the same conclusion, see his article in the *New York Times* entitled, "Omnibus 'Gag' Orders," November 30, 1975, Sec. IV, p. 13.

circumstances. It did (i) recommend revisions in the canons of professional ethics (subsequently adopted as DR7-107) to control conduct of prosecution and defense counsel; (ii) recommend standards of conduct for judges and judicial employees; (iii) recommend that law enforcement agencies be encouraged to adopt standards; (iv) make recommendations as to the appropriate conduct of judicial proceedings in criminal cases; and (v) make recommendations as to the use of the contempt powers.

The most recent report of which we are aware reaches similar conclusions. A revised draft of "Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press" was issued by the ABA Legal Advisory Committee on Fair Trial and Free Press, in November 1975. The draft, which proposes certain procedures prior to the entry of any restrictive orders, is itself a recognition that the press is not usually afforded any procedural safeguards prior to the issuance of orders which would effectively reduce the flow of information to it and to the public—orders to court officers, counsel and the like. As the reports before it had done, this latest report speaks unequivocally as to its hostile view to any direct restraints upon the media.

First by recommending the procedure for adoption of Standing Guidelines and Special Orders, the Committee wishes to stress that it does not intend to recommend or encourage the use of judicial restrictive orders. Further, given the apparent ever-increasing tension between the courts and the press in executing their respective functions, and the significant constitutional problems which may be raised by the issuance of certain restrictive orders, *the Committee specifically rec-*



*ommends against the issuance of any orders which would impose direct restraints on the press. It is clear that the free flow of information concerning court business is important and necessary not only to the requirements of a free press and a fair and public trial, but the greater public understanding of the judicial function and the rule of law in our society. [Emphasis added.]*

To the same effect, see Roney, "The Bar Answers the Challenge," 62 A.B.A.J. 64 (1976).

In short, the means set forth in *Sheppard* for assuring full Sixth Amendment protections for defendants have been supported by each of these studies, none of which recommends any effort to utilize prior restraints against publication. And the imaginative use of these methods provides defendants with full Sixth Amendment protections,<sup>33</sup> without any intrusion into First Amendment rights.

## II.

### **The Imposition by the Nebraska Courts of Prior Restraints on Reporting About Criminal Proceedings Is in Direct Violation of the First Amendment**

Prior to the 1930's, it was simply assumed by this Court that prior restraints on the press violated the First Amendment. In fact, so clear was the bar believed to have been imposed by the First Amendment upon prior restraints on publication that Mr. Justice Holmes, writing for this Court in *Patterson v. Colorado Ex rel. The Attorney General*, 205 U.S. 454, 462 (1907), could unequivocally state that:

<sup>33</sup> The judiciary appears generally to agree. See, F. S. Seibert, "Trial Judges' Opinion on Prejudicial Publicity" (1970).

\* \* \* [T]he main purpose of such constitutional provisions [the First and Fourteenth Amendments] is "to prevent *all* such *previous restraints* upon publications as had been practiced by other governments." \* \* \* [Emphasis partly added and partly in the original.<sup>34</sup>]

<sup>34</sup> Mr. Justice Holmes' quotation is taken from two cases decided in the formative days of the nation, *Commonwealth v. Blanding*, 3 Pick. 304, 313-314 (1825), and *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 325 (1788).

Even in early days, state decisions consistently held that prior restraints on publication were impermissible regardless of the facts sought to be suppressed. *E.g.*, *Brandreth v. Lance*, 8 Paige Ch. 24 (N.Y. 1839). Thus, in *Dailey v. Superior Court*, 112 Cal. 94, 44 Pac. 458 (1896), the Supreme Court of California refused to enjoin the production of a play about a pending murder trial despite the claim of the defendant in that trial that he was being seriously prejudiced. The court said:

By the [California] constitutional provision we are about to invoke, a citizen may speak, write, or publish his sentiments with equal freedom, and this case now stands before us exactly as though one of the daily journals was threatening to publish its sentiments pertaining to the conduct of a criminal trial then pending, and the court where such trial was pending and in progress, believing such publication would interfere with the due administration of justice, had issued an order restraining and prohibiting the threatened action of the paper. \* \* \* The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose. [44 Pac. at 459.]

See also *In re Shortridge*, 99 Cal. 526, 34 Pac. 277 (1893) (order stricken barring newspapers from publishing public testimony in divorce cases); *cf. Ex parte Foster*, 44 Tex.Crim. 423, 71 S.W. 593 (1903) (contempt conviction reversed of a reporter who had published testimony introduced in court.)



It was not until the case of *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), that this Court was first directly confronted with a prior restraint against the press. In *Near*, such a restraint was sought against a racist publication as a public nuisance under a state statute permitting injunctions to issue against "malicious, scandalous and defamatory" publications (283 U.S. at 702). This Court, in its decision by Chief Justice Hughes, approvingly repeated Mr. Justice Holmes' statement for the Court quoted above, *id.* at 714, and held the prior restraint unconstitutional.

One passage in Chief Justice Hughes' opinion concedes that the prohibition upon prior restraints need not be viewed as "absolutely unlimited" and goes on to note that the possible exceptions to that prohibition are that during a war the government "might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops" (*id.* at 716).

At least the first of these possible exceptions asserted by Chief Justice Hughes now seems of dubious viability. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The other military hypothetical posed by Chief Justice Hughes was to be considered again by this court in *New York Times Co. v. United States*, 403 U.S. 713 (1971), which we discuss shortly. The dictum in *Near*, however, together with language in the *New York Times Co.* litigation, remain the *only* authorities of this Court containing language indicating that prior restraints on the press may ever be upheld. Indeed, so clear was it that the *Near* exception to the flat ban on prior restraint encompassed only the narrowest category of wartime military information, that five years after *Near* was decided, this Court in *Gros-*

*jean v. American Press Co.*, 297 U.S. 233, 249 (1936), unanimously concluded once again that "by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting *any* form of previous restraint upon printed publications \* \* \*" (emphasis added).

This Court did not come to speak again to the issue of prior restraints on the press until its *New York Times Co. v. United States* ruling.<sup>35</sup> That ruling was

<sup>35</sup> In the interim, a variety of state cases had been decided, each holding prior restraints on press coverage of the courts to be unconstitutional. *E.g.*, *Ex parte McCormick*, 129 Tex. Crim. 457, 88 S.W.2d 104 (1935) (order held void barring a reporter from printing testimony introduced in open court); *State v. Morrow*, 57 Ohio App. 30, 11 N.E.2d 273 (1937) (order to press not to print names of grand jurors held void); *Ithaca Journal News, Inc. v. City Court of Ithaca*, 58 Misc.2d 73, 294 N.Y.S.2d 558 (Sup. Ct. Thompson County 1968) (order barring newspaper from publishing the names of youthful offenders where the reporter had obtained names prior to the sealing of the information held unlawful).

The final two state cases decided in this area prior to the *New York Times Co.* decision are both analogous to the present case, and again, each held unconstitutional prior restraints on the press. In *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (Ariz. 1966), a district judge had entered an order directing the press not to publish information introduced at a habeas corpus hearing with respect to a forthcoming murder trial. The Arizona Supreme Court held the order void under the Arizona free press guarantee, observing that "[t]here can be no censor appointed to whom the press must apply for prior permission to publish \* \* \*" (*id.* at 596). And in *State v. Sperry*, 79 Wash.2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971), an order of a lower Washington state court holding that the press could not publish information relating to proceedings at a trial unless they occurred in the presence of a judge and jury was held void under the Washington state free press guarantee in a thoughtful opinion by the Supreme Court of that state.

rendered in June 1971. While the Court was divided as to some issues in that case, Chief Justice Burger later confirmed that with respect to the holding of the Court that any prior restraint against the press was presumptively unconstitutional, the Court was unanimous. *See Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting). It is significant that the Court refused to permit the imposition of the prior restraint despite the facts that the Pentagon Papers were in their entirety classified TOP SECRET—SENSITIVE; that they were obtained in a surreptitious manner; that a majority of the Court indicated that publication of portions of them would be harmful to the nation; and that a majority of the Court indicated that a conviction for violation of the Espionage Act might be sustained for the publication of material contained in the Pentagon Papers.

Thus, the fact that there may be a single narrow exception to an otherwise rigid rule should not allow the courts, as the Nebraska Supreme Court did here, to engage in a balancing of interests, cavalierly carving out exceptions almost as if those made up the rule itself. Quite to the contrary, as this Court made explicitly clear in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975), a ban on the release of news in order to be lawful “first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints \* \* \*.”

With its ruling in the *New York Times Co.* case, the Court had heard its last prior restraint case involving the press until this one.<sup>36</sup> However, prior to the *New*

<sup>36</sup> We exclude from this listing the Court’s ruling in *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, *supra*, which

*York Times Co.* decision, the Court had given strong indication of its views on precisely the issue before the Court at this time. In *Sheppard v. Maxwell*, *supra*—a case we have already discussed at some length—the Court not only had indicated that the courts could not enter any order “that proscribes the press from reporting events that transpire in the courtroom” (384 U.S. at 363), but had also concluded that, in language we have already quoted, the press has a particular duty to subject judicial proceedings—especially in the criminal field—to close scrutiny on behalf of the public (*id.* at 350).<sup>37</sup> This is why the Court has “been unwilling to place any direct limitations on the freedom traditionally exercised by the news media, for ‘[w]hat transpires in the court room is public property’” (*id.* at 350; emphasis added; quoting from *Craig v. Harney*, *supra*, 331 U.S. at 374).

*Sheppard* has been consistently understood by lower courts in their decisions as reaffirming the bar on prior restraints against the press in its reporting of judicial proceedings while permitting the courts to take other means to protect against the possibility of prejudicial publicity.<sup>38</sup>

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the majority of the Court held not to constitute a prior restraint case because of the commercial character of the advertisement. The dissenting opinions of Chief Justice Burger and Mr. Justice Stewart concluded that the bars on the press there involved were prior restraints and hence unconstitutional. In the instant case, of course, there is no question about the protected nature of the publications involved.

<sup>37</sup> One example of what the Court was referring to is the reporting of Pulitzer-prize winner Ed Mowery of the New York World-Telegram and Sun, who in 1945 and again in 1952 published stories indicating the innocence of individuals convicted of crimes they had not committed. See, Hochenberg, *The Pulitzer Prize Story*, 128 (1959). Many others could be cited.

<sup>38</sup> For example, *Younger v. Smith*, 30 Cal.App.3d 138, 106 Cal.



Despite the weight of these judicial opinions, the Nebraska Supreme Court issued its prior restraint, and purported to base it on a decision of this Court—that in *Branzburg v. Hayes*, *supra*. According to the Nebraska court, dictum in the *Branzburg* opinion to the effect that the press “may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal,” 408 U.S. at 685, leads to the conclusion that prior restraints on reporting material about pending trials may “under some circumstances” be appropriate. We believe this reading of the Court’s language in *Branzburg* as supportive of some prior restraints on the press is untenable.

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Rptr. 225 (1973), involved, *inter alia*, a court order that “all agencies of the public media, including written publications, radio, and television, their respective reporters, editors, publishers, and other agents, refrain from the publication of any matter with respect to the present cause except as occur in open court, and particularly as proscribed in the preceding paragraphs of this Order” (106 Cal.Rptr. at 246; emphasis deleted).

The California Court of Appeals held that “the direct restraint against the media was impermissible” (106 Cal.Rptr. at 236). Observing that in *Sheppard*, this Court had considered a case with far more publicity, much of which was openly hostile to the defendant, and that in spite of all the publicity the Court had “brushed aside any consideration” of sanctions against “a recalcitrant press” on the ground that less drastic measures would “guarantee” Sheppard a fair trial, the *Younger* Court ruled unconstitutional the restrictions on publication attempted in that case.

See also *Oliver v. Postel*, 30 N.Y.2d 171, 331 N.Y.S.2d 407, 282 N.E.2d 306 (1972); *State ex rel. Miami Herald Pub. Co. v. Rose*, 271 So.2d 483 (Fla. App. 2d Dist. 1972); *Sun Co. v. Superior Court*, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (4th Dist. 1973); *United States v. Dickinson*, *supra*; *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107 (5th Cir. 1974); *United States v. Schiavo*, *supra*; *Calley v. Callaway*, *supra*; *Wood v. Goodson*, 253 Ark. 196, 485 S.W.2d 213 (1972).

*Branzburg*, of course, was not a prior restraint case. Indeed, Mr. Justice White, writing for a majority of the Court, was careful to point to precisely that fact in support of his conclusion that the full testimonial privilege sought by the press in that case should not be granted.<sup>39</sup> More importantly, *all* of Mr. Justice White’s relevant language in *Branzburg* related not to prior restraints but to the right asserted by the press under the First Amendment to gather news.<sup>40</sup> Thus, the context of the language quoted by the Nebraska Supreme Court from Mr. Justice White’s opinion was the following:

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965); *New York Times Co. v. United States*, 403 U.S. 713, 728-730 (1971), (Stewart, J., concurring); *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883, 885 (CA3 1958); *In the Matter of United Press Assns. v. Valente*, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954). In *Zemel v. Rusk*, *supra*, for example, the Court sustained the Government’s refusal to validate passports to Cuba even though that restriction “render[ed] less than wholly free the flow of information concerning that country.” *Id.*, at 16. The ban on travel was held constitutional, for “[t]he right to speak and publish does not carry with it the unrestrained right to gather information.” *Id.*, at 17.

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<sup>39</sup> “But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold” (408 U.S. at 681).

<sup>40</sup> See, e.g., Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 U.Pa.L.Rev. 166 (1975).



Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), for example, the Court reversed a state court conviction where the trial court failed to adopt "stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested," neglected to insulate witnesses from the press, and made no "effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides." *Id.*, at 358, 359. "[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." *Id.*, at 361. See also *Estes v. Texas*, 381 U.S. 532, 539-540 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963).

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. [408 U.S. at 684-685; footnotes deleted.]

We submit that it is a misreading of the opinion of the Court in *Branzburg* to conclude that it supports, even in dicta, the entry of prior restraints against the

press. A far plainer reading, we submit, is that a press denied access to a narrow category of court proceedings cannot, therefore, report about those proceedings. Indeed, if there were any doubt about that interpretation of the opinion, we believe it was resolved in Mr. Justice White's concurrence in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), where he wrote the following in a concurring opinion:

According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. *New York Times Co. v. United States*, 403 U.S. 713 (1971). A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. Cf. *Mills v. Alabama*, 384 U.S. 214, 220 (1966). We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press. [418 U.S. at 259; footnote deleted.]

We believe it inconceivable that the *Branzburg* opinion was intended to support, without benefit of a single citation to a prior restraint decision or a discussion of the long unbroken history of reversals of such restraints, the lowering of the "virtually insurmountable

barrier" referred to in *Tornillo*.<sup>41</sup> And if *Branzburg* is to be read as it was by the Nebraska Supreme Court, then we submit it is inconsistent with the body of prior restraint case law previously established in this Court and that its dictum should be overruled.<sup>42</sup>

We submit, therefore, that the Nebraska decision not only ignores this Court's ruling in *Sheppard* and misreads the majority decision of the Court in *Branzburg*, but misapprehends the prior restraint and more general First Amendment law established by this Court.

A dichotomy is set forth in the decision under review between speech to be protected against prior restraints and speech as to which prior restraints may be entered after the application by the courts of a balancing process. As summarized in the Nebraska ruling:

<sup>41</sup> The Fifth Circuit also believes that this Court could not possibly have meant literally the referred-to language in *Branzburg*. See *United States v. Dickinson*, *supra*, 465 F.2d at 507 n. 14.

<sup>42</sup> Nor is there any support for the issuance by the Nebraska Supreme Court of its prior restraints in the two recent rulings by this Court on the stay motions heard by it. In *Times-Picayune Pub. Corp. v. Schulingkamp*, *supra*, Mr. Justice Powell as Circuit Justice granted a stay of an order barring the press from publishing information similar to that prohibited by the order before this Court. And *Newspapers, Inc. v. Blackwell*, No. A-981, stay denied June 2, 1975, involved a restrictive order preventing the publication of the names of jurors selected to serve on a panel which was to be in force during the trial itself. Although the order there was apparently a clear violation of the principles of *Cox Broadcasting Corp. v. Cohn*, *supra*, and the prior restraint cases discussed herein, this Court, having been informed by an *amicus* that the trial might terminate within two days of the time the stay application was actually denied, declined to grant the stay. (Mr. Justice Brennan and Mr. Justice White would have granted the stay; the Chief Justice and Mr. Justice Douglas did not participate).

That the press be absolutely free to report corruption and wrongdoing, actual or apparent, or incompetence of public officials of whatever branch of government is vastly important to the future of our state and nation cannot be denied as anyone who is familiar with recent events must be well aware. Prior restraint of the press, however slight, in such instances is unthinkable. *Near v. Minnesota*, *supra*. [Cert A 61a.]

In other situations, however, the Nebraska court urges an "accommodation" between allegedly conflicting constitutional imperatives and a resolution of that accommodation by the imposition of prior restraints on the press. These other situations are defined as follows:

In cases where equally important constitutional rights may collide then it would seem that under some circumstances, rare though they will be, then an accommodation of some sort must be reached. It is difficult to accept the relators' position that press in such cases must be completely unrestrained even if the cost is that a criminal cannot be tried. It is also difficult to accept the proposition that an accused may not be irreparably harmed by wrongdoing incarceration. *Sheppard v. Maxwell*, *supra*, is a case in point. [Id.]

The legal discussion in the Nebraska ruling that follows simply cannot withstand analysis. For one thing, the *Sheppard* decision is itself clear that, contrary to the views expressed in the Nebraska decision, it was *not* the press that caused the ten-year improper incarceration of a defendant; it was the failure of the trial judge to take the steps described by Mr. Justice Clark which would have protected the defendant's right to a fair trial, even in that most sensational case. And, more specifically, the reversal of *Sheppard* was



not occasioned by the failure of the trial judge to place any direct limitations on the freedom traditionally exercised by the news media. That, in fact, is what he was told he could not do (384 U.S. at 356).

More broadly, the Nebraska ruling assumes—and assumes wrongly—the answer to the critical question with respect to *who* shall decide when and whether confessions and the like shall be published. According to the Nebraska decision, the judiciary is to apply different degrees of “values” in weighing with respect to “each and every exercise of freedom of the press”—that is, to consider the racist speech in *Near*<sup>43</sup> more protected than the accurate recitation of facts about a public preliminary hearing, as in this case.

But this Court has consistently ruled otherwise. It has forsaken any power in the courts to make precisely such decisions, holding that it is the press that must decide what to print and how to weigh the sometimes awesome competing claims of silence and exposure. As stated by Chief Justice Burger for the Court in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 124-125 (1973):

For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt \* \* \*. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

<sup>43</sup> See 283 U.S. at 724-726.

Again, in *Miami Herald Pub. Co. v. Tornillo*, *supra*, Chief Justice Burger stated for the Court:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. [418 U.S. at 258.]

To rule otherwise would place the courts in the intolerable position of weighing the social value of one type of news story against another—and, indeed, one confession against another. One need only contemplate the judicial decision-making process as to whether a confession of Sirhan Sirhan or Charles Manson or a defendant in one of the Watergate trials could be published—and how to “balance” the public’s interest in reading the confession against that of the defendant. Under the First Amendment, such decisions are simply not the judiciary’s to make.

To be sure, the Nebraska ruling may be read as not requiring any such judicial balancing, but only the resolution by the courts of the question of whether the publication of a confession or other “information sharply implicative” of the guilt of the accused “might make it difficult or impossible for the State of Nebraska to afford Simants a trial before an impartial jury \* \* \*” (Cert A 59a). If this is the reading intended, however, then the publication of any confession and any “information strongly implicative of guilt” may be enjoined—no matter how newsworthy it may be.



Under this approach, the publication of the confession to a crime of a sitting public official might be enjoined;<sup>44</sup> as might the confession of a Manson-style mass murderer; or, indeed, the confession of an alleged presidential assassin. So sweeping is the ban on publication that the investigative journalism that exposed the corruption of the Tweed Ring in Tammany Hall, the abuses of governmental power in the Credit Mobilier scandal and, of course, much of the Watergate scandal all could be barred—in the name of avoiding publication of “information strongly implicative of guilt \* \* \*.”<sup>45</sup>

We know that we need not remind this Court of the *reasons* why an American free press is even more vital in today's world than it was when Jefferson said, “Where the press is free, and every man able to read, all is safe.”<sup>45A</sup> One need only scan the daily papers to be made continually aware of the inroads upon freedom of the press now underway in so many parts of

<sup>44</sup> Here again, Judge Murray's admonition in *United States v. Mandel, supra*, is instructive. In denying a prior restraint on witnesses, he said:

The Court is also sensitive to the fact that the public has an overriding interest in seeing that justice is fairly administered. This interest is unquestionably heightened when, as in this case, charges have been brought against the Governor of the state, and where allegations have been made by the Governor that the prosecution is politically motivated. [Slip. op. 9.]

<sup>45</sup> Pulitzer prize winning journalism included in the net cast by the Nebraska ruling would encompass such exposes as the Boston Post's articles on the illegal operations of Charles Ponzi in 1920, the New York Sun's expose of criminals in power on the New York waterfront in 1947, and the Chicago Daily News' unmasking of State Auditor Orville E. Hodge as a thief in 1956. See Hohenberg, *The Pulitzer Prize Story, supra*, 66, 116, 336.

<sup>45A</sup> Letter to Charles Yancey, Jan. 6, 1816, 10 *The Writings of Thomas Jefferson* 4 (P. Ford ed. 1899).

the world. Suppression, censorship, and governmental control in various forms are not the sole province of countries which have traditionally regarded the press as an arm of government.<sup>46</sup> As noted by Mr. Peter Galliner, Director of the International Press Institute of Zurich, Switzerland, significant inroads upon free communication have recently been made in India, Bangladesh, Nigeria, Portugal, Zambia, South Korea and the larger Latin American countries.<sup>47</sup> In Spain, publications have been seized and journalists arrested; in Italy, legislation has placed penalties upon revealing secret police investigations; on Malta, the Prime Minister has gained control of virtually all the media, and in Portugal, two editors have been detained, one daily newspaper suspended, and a radio station occupied (*id.*). The sad tales in India and the Philippines are too well known to bear repetition.<sup>48</sup>

<sup>46</sup> At a recent Intergovernmental Meeting of Experts to Prepare a Draft Declaration on Fundamental Principles Governing the Role of the Mass Media in Strengthening Peace and International Understanding and in Combatting War Propaganda, Racism and Apartheid, held in Paris on December 15-22, 1975, the Soviet Union proposed the following article to be included in the declaration:

States shall bear responsibility for the activities of the mass media in territories under their jurisdiction, in accordance with international law.

In addition, Mongolia proposed the following article:

States are responsible for the activities in the international sphere of all mass media under their jurisdiction.

The article proposed by Mongolia was actually adopted as Article XII of the Draft Declaration by a vote of 19 for and 12 against, with eight recorded abstentions. This occurred at a time when a number of nations, including the European nine, the United States, Canada and Australia were voluntarily absent from the meeting. There were between 50 and 60 nations initially participating.

<sup>47</sup> See Editor & Publisher, December 27, 1975, p. 10.

<sup>48</sup> One aspect of prior restraint orders—that they so often fail to

Chief Justice Burger said it all in an interview last summer videotaped by the United States Information Agency. He pointed out that one of the first steps taken by a person or group attempting to seize power in a country is "to put a limit on freedom of expression, a limit on a free press." 61 A.B.A. Journ. 1352 (November 1975). We do not imply for a moment that any court in this country would consciously be part of any such effort. We do point out that once a branch of government—in this case, the judiciary—has found reasons for telling the press, on pain of criminal contempt, what it can and cannot publish, we have started down that long and dismal road where it becomes easier and easier to discover reasons why news should not reach the public—at least for a while.

Today it is a confession. Tomorrow it is the indictment of a public official just prior to an election. And soon the whole concept has changed, and the people learn what government wants them to learn.

That is why this Court in this case, at the threshold of a whole new controversy over prior restraints, has such a unique opportunity to stop in its tracks what

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accomplish their intended purpose or are even self-defeating—is illustrated by the situation in India. A news dispatch from New Delhi dated January 15, 1976, noted that "In today's India, with all the regular information media now controlled by the Government, the rumor has become a conversational staple . . . . Prime Minister Indira Gandhi says that one of the reasons for the censorship that her Government imposed last June was to end the spread of 'vicious rumors.' . . . But some Indians think that rumors have an even more central role now than they had before the strict new political order was imposed." N.Y. Times, Jan. 18, 1976, Sect. I, at 12. Similarly, news of the imposition of "gag" orders, particularly in small communities, can frequently cause residents to draw more damaging conclusions about a defendant and his past than would be warranted by the actual facts.

could become a trend so tragically detrimental to the very first Amendment to our American Constitution.

### III.

#### **This Record Will Not Support a Prior Restraint Order**

Petitioners respectfully submit that no matter what criteria, formulae or standards are applied in this case, the prior restraint order entered by the Nebraska Supreme Court cannot be upheld. The record in this case simply will not support the entry of such a prior prohibition against the publication of news.

The order under review here is the one entered on December 1 by the Nebraska Supreme Court.<sup>49</sup> That court, of course, could base its order only on the record before it. That record has been summarized in our Statement of the Case. As shown there, only one "evidentiary" hearing has been held in the entire chronicle of events that has led to the present prior restraint. In other words, there has been only one instance in which any "evidence" of any kind has been inserted into the record. That was at the October 23 hearing before the District Court.

The "evidence" at that hearing consisted in essence of the identification of docket entries in the *Simants* case, the receipt of thirteen news articles, and Judge

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<sup>49</sup> Despite the importance of the constitutional issues in this case and the serious impact of the order upon Petitioners' ability to transmit information to the public, the reasoning supporting the restraints imposed by the Nebraska Supreme Court was stated by only a minority of that court. Chief Justice White and Justice Clinton dissented on jurisdictional grounds and never reached the merits (Cert A 66a). Justices Spencer and Newton joined the majority solely to resolve the dispute but said they agreed with the dissenters (Cert A 69a).



Ruff's testimony that he had seen three or four of those articles; that he was generally aware of national press attention, including radio and television publicity; that unidentified members of his court had spoken to him about the matter; and that his "main criteria" consisted of "[c]onversation around the courthouse," *i.e.*, from unidentified counsel—none of which information had been made part of any record before him prior to the entry of his own order.

Several points should immediately be noted.

First, the District Court itself apparently did not rely on any of the above "evidence" in issuing its October 27 order. This order stated that "because of the nature of the crimes charged in the complaint," pre-trial publicity "could" impinge upon Simants' right to a fair trial (Cert A 9a). Such a standard presumably would warrant prior restraints in each and every case of multiple crimes, crimes involving sex or perversion and crimes involving prominent persons. In fact, where crimes are in any way different from the ordinary, day-to-day, "police blotter" crimes that plague all of our towns and cities, this standard would appear to allow for blanket restraints on the press. It is, in essence, no standard at all—certainly not in any constitutional sense. If, somehow, "the nature of the crimes charged" were the test, and the District Court meant to imply that some crimes, by their very nature, generate more interest and publicity than others, certainly the earliest victim of such a standard would be crimes involving well-known political figures. Under such a standard, for example, there would have been no coverage of Watergate prior to trial.

But we need not press the point, because the Nebraska Supreme Court, while adopting the District Court's

conclusion that there was a "clear and present danger," apparently rejected the District Court's total reliance upon the nature of the crimes<sup>50</sup> and instead sought actual evidence in the record to support this conclusion and its own amended order.<sup>51</sup> It purported to find such evidence in news articles introduced as Exhibits 4G, 4N and 4M (which was the same as 4B) and in population figures for the area involved.

We note, first, that two out of three articles relied upon by the Nebraska Supreme Court (Cert A 59a) were different from those relied on by the County Court, and that all three were apparently ignored by the District Court. Secondly, a review of the three articles reveals that they were all the result of ordinary, factual reporting on a matter of intense local interest—nothing more and nothing less. Moreover, the articles performed an extremely important public-interest function. Immediately after the murders, the press, in full cooperation with the authorities, alerted the community to the possible dangers of other attacks. When Simants was taken into custody, news of the arrest of a suspect helped not only to allay the fears of local residents but to diffuse a potentially dangerous situation, in view of the rumors of snipers and the presence of loaded guns.

Thirdly, to convert three straight news articles—or even all thirteen of the articles before the District

<sup>50</sup> "The mere heinousness or enormity of a crime is, of course, by itself, no reason at all for a prior restraint of freedom of the press, but certainly it is a matter which a court may take into consideration along with all the other factors involved" (Cert A 61a).

<sup>51</sup> "Does the evidence in the court below support the Court's finding so as to overcome the heavy presumption of unconstitutionality of the prior restraint?" (Cert A 56a.)



Court—into an excuse for a prior restraint on the press is to turn the First Amendment on its head; this type of reporting was supposed to be encouraged and protected, not silenced, by the First Amendment. Finally, one of the three articles was from a newspaper published 200 miles from the planned site of the trial, and another was from a newspaper published 250 miles from the site and in a different state. To assume that despite all the protections accorded jurors under *Sheppard*, these three articles could somehow prevent a defendant from receiving a fair trial is simply to blink reality and to conclude that *all* publicity about crimes is destructive of fair-trial protections and must be suppressed.

As to the other factor apparently relied upon by the Nebraska Supreme Court—the population of the area—we submit that even if the potential jurors were all selected from the counties listed by the Nebraska Supreme Court, it is absurd to argue, on the basis of the publicity in this case, that a prior restraint on the publication of news can be sustained because twelve persons who had “not already made up their minds as to the defendant’s guilt or innocence” (Cert A 56a) might not be found from among 82,000 inhabitants. This is particularly true in light of the recent findings, referred to previously, that jurors need not be totally free from all knowledge of a case and that the effect of news publicity may well be minimal.

As for the “finding” of clear and present danger made by the District Court (Cert A 9a) and apparently adopted by the Nebraska Supreme Court (Cert A 56a), careful attention should be paid as to how it

evolved and on what it was based.<sup>52</sup> The original application by the County Attorney for a prior restraint order made no mention of such a clear and present danger. It argued only that there was “a *reasonable likelihood* of prejudicial news which would make *difficult, if not impossible*, the impaneling of an impartial jury” (emphasis added). The County Court also made no reference to a clear and present danger; it adopted the same “reasonable likelihood” standard proposed by the County Attorney (Cert A 1a). The District Court was the first to refer to a clear and present danger, but it did so solely on the basis of the nature of the crimes committed, and even then it found only that there was a danger that pre-trial publicity “could” impinge upon the defendant’s right to a fair trial (Cert A 9a). Finally, the Nebraska Supreme Court, solely on the basis of the record before the District Court plus population figures—all of which we have already analyzed—simply concluded that there was a sufficient basis for the finding of a clear and present danger. Throughout the majority opinion there are references to rights that “could” be substantially impaired (Cert A 56a) or “may” be impaired (*id.*), to evidence that “rather clearly indicate[s]” the necessity to protect the accused (*id.*), to publicity that “might” make it difficult or impossible to obtain an impartial jury (*id.* at 59a), to cases like this one which make it “much more difficult” to obtain an impartial jury (*id.* at 60a), and to the supposition that cases “are likely to occur” in which criminals go free or

<sup>52</sup> Such a finding, of course, is no magic talisman. This Court must itself weigh the underlying facts to determine whether the requisite standard—whatever that may be—has been met. *E.g.*, *Pennkamp v. Florida*, 328 U.S. 331, 335, 336, 346 (1946); *Wood v. Georgia*, 370 U.S. 375, 385-389 (1962).

innocent persons are convicted unless prior restraints are entered (*id.* at 62a).

We respectfully submit that no matter what standard is applied by this Court to prior restraints on the reporting of judicial proceedings, that standard could not possibly be said to find a proper evidentiary basis in this record. Prior restraints could not, even under the most lenient view of their utility and constitutionality, be grounded upon what could happen or what might happen or how difficult the trial court's job might become without them—or upon “[c]onversation around the courthouse” overheard by some judge.

We turn, then, to two additional and bizarre aspects of the particular prior restraint which binds Petitioners.

First, the Nebraska Supreme Court observed that if Petitioners had not contested the prior restraint order by submitting themselves to the jurisdiction of the District Court, they “could have ignored the [prior restraint] order” (Cert A 58a). In other words, the District Court had no power to bind those who were not served or otherwise placed under its direct jurisdiction. Whether this conclusion was correct or not, it imposes, of course, a terrible penalty upon those attempting to take all appropriate steps to protect the constitutional rights of the public as well as the media. More importantly for present purposes, however, the Nebraska Supreme Court's conclusion has resulted in Petitioners being subjected to prior restraints which were never applicable to any other media in the State of Nebraska or elsewhere (Cert A 49a, 64a). In other words, Petitioners' competitors could and did print and publish the very items of information which Pe-

titioners could not. The result is thus not only inequitable but self-defeating, since even under the broadest interpretation of the Nebraska Supreme Court's order, potential jurors could see and hear on national television or read in other newspapers and news magazines what they could not read in Petitioners' newspapers or hear on Petitioners' radio programs.

Secondly, among the facts which the Nebraska Supreme Court forbade Petitioners from publishing was any “information strongly implicative of the accused as the perpetrator of the slayings” (Cert A 64a). Such a restraint, which could apply to any fact from the suspect's arrest to his hiring of a criminal attorney, is totally incapable of logical interpretation and application. We submit it is void on its face.

The conclusion seems inevitable that even if the Court were now to be less firm in its resistance to prior restraints than it has ever been in the past—an attitude which we strongly urge the Court to reject—the particular restraint in *this* case could not possibly be upheld. It is based upon such complete generalizations, so flimsy a record, and so shifting a standard; it is so inequitable in its application, and it is so self-defeating in terms of what it seeks to accomplish, that under no circumstances could it be made the basis of the suppression of free speech and press.

#### CONCLUSION

We respectfully submit that the trial judge in this case had a full panoply of methods available to him to protect Mr. Simants from the possibly harmful effects of prejudicial publicity—harmful effects, incidentally, which have certainly never been shown to

exist on this record. The trial judge, now upheld by the Nebraska Supreme Court, chose instead to prevent the press from publishing certain information. As a result, the free flow of information to the public stopped, and the discussion of what and when to publish passed from a free press to a branch of government, the judiciary. That result, we submit, was a direct violation of the First Amendment. We urge the Court to reassert its prior decisions and to rule without equivocation that under circumstances such as those posed in this case, no direct prior restraint on the press is constitutionally permissible.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.  
HOGAN & HARTSON  
815 Connecticut Avenue, N.W.  
Washington, D.C. 20006

JAMES L. KOLEY  
STEPHEN T. MCGILL  
MCGILL, KOLEY & PARSONAGE, P.C.  
Suite 300  
10010 Regency Circle  
Omaha, Nebraska 68114

*Attorneys for Petitioners*



MAR 11 1976

MICHAEL RODAK, JR., CLERK

**IN THE**  
**Supreme Court of the United States**

**No. 75-817**

**NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-  
HERALD COMPANY; THE JOURNAL-STAR PRINT-  
ING CO.; WESTERN PUBLISHING CO.; NORTH  
PLATTE BROADCASTING CO.; NEBRASKA BROAD-  
CASTING ASSOCIATION; ASSOCIATED PRESS;  
UNITED PRESS INTERNATIONAL; NEBRASKA PRO-  
FESSIONAL CHAPTER OF THE SOCIETY OF PRO-  
FESSIONAL JOURNALISTS/SIGMA DELTA CHI; KI-  
LEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES  
HUTTENMAIER; WILLIAM EDDY,**

*Petitioners,*

**vs.**

**THE HONORABLE HUGH STUART, JUDGE DISTRICT  
COURT OF LINCOLN COUNTY, NEBRASKA, ERWIN  
CHARLES SIMANTS, INTERVENOR, AND THE  
STATE OF NEBRASKA, INTERVENOR,**

*Respondents.*

**On Writ of Certiorari to the  
Supreme Court of the State of Nebraska**

**BRIEF OF RESPONDENT, STATE OF NEBRASKA**

**MILTON R. LARSON  
JOHN P. MURPHY  
Lincoln County Attorney's Office  
Lincoln County Courthouse  
North Platte, Nebraska 69101  
ERWIN N. GRISWOLD  
JONES, DAY, REAVIS & POGUE  
1100 Connecticut Avenue N.W.  
Washington, D. C. 20036  
*Attorneys for Respondent, State  
of Nebraska***

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IN THE  
**Supreme Court of the United States**

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTING ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY,

*Petitioners,*

vs.

THE HONORABLE HUGH STUART, JUDGE DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA, ERWIN CHARLES SIMANTS, INTERVENOR, AND THE STATE OF NEBRASKA, INTERVENOR,

*Respondents.*

On Writ of Certiorari to the  
Supreme Court of the State of Nebraska

**BRIEF OF RESPONDENT, STATE OF NEBRASKA**

**QUESTIONS PRESENTED**

1. Whether, consistently with the First, Sixth, and Fourteenth Amendments to the United States Constitution, a direct prior restraint may be imposed upon the publication by the press of information which does not relate to national security and which could not result in direct, immediate and irreparable injury to the nation or its people.

2. Whether, consistently with the First, Sixth, and Fourteenth Amendments to the United States Constitution, a temporary restrictive order may issue prohibiting publication by the press of certain information revealed in pre-trial court proceedings open to the public and from other sources about pending judicial proceedings.

3. Whether, consistently with the First, Sixth, and Fourteenth Amendments to the United States Constitution, the order of the Nebraska Supreme Court dated December 1, 1975, prohibiting publication by the Petitioners can be sustained as a matter of fact and law on this record.

#### CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law . . . abridging the freedom of speech or of the press . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

#### STATEMENT OF THE CASE

##### (a) Matters Leading to the Grant of Certiorari

The factual background of this action related by Peti-

tioners in their Statement of the Case is accepted by Respondent with additions and exceptions as follows:

Respondent, the State of Nebraska, is a party by virtue of its intervention in Petitioners' original action in the Nebraska Supreme Court against the Honorable Hugh Stuart, District Court Judge of Lincoln County, Nebraska, the decision of which Court, issued on December 1, 1975, provided the basis for this Court's grant of Certiorari on December 12, 1975. On the 21st day of October, 1975, Respondent made a formal motion in the Lincoln County Court for a restrictive order, setting forth its belief that there was a reasonable likelihood of prejudicial news coverage relating to the preliminary hearing of Erwin Charles Simants. This defendant was charged with six counts of first degree murder or murder in the perpetration or attempt to perpetrate a sexual assault in the first degree, in accordance with the terms and provisions of the Statutes of the State of Nebraska. The Respondent further represented that such coverage would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial should the defendant be bound over for trial to the District Court of Lincoln County, Nebraska. Thereafter, Petitioners were required, by a series of decisions of the County Court of Lincoln County, Nebraska, the District Court of Lincoln County, Nebraska, and the Supreme Court of the State of Nebraska, to refrain from publishing certain information relating to the case of *State v. Simants* now pending on appeal to the Nebraska Supreme Court.

Milton R. Larson, in his capacity as Lincoln County Attorney, was notified at approximately 9:45 p.m. on the evening of October 18, 1975, that the Lincoln County Sheriff had immediate need of his services in Sutherland,

Nebraska. Upon arrival in Sutherland, he was directed by attendants of the community ambulance service to the residence of Henry Kellie located on the north edge of the Village of Sutherland. Numerous law enforcement personnel, including Lincoln County Deputy Sheriffs, State Patrol Troopers, and criminal investigators with a mobile crime unit, had already arrived. Upon entering the residence, Milton Larson witnessed the results of what had apparently been the brutal slaying of five people. Though only five bodies were discovered at the residence, it was learned that one other individual had been shot, taken to the Great Plains Medical Center in North Platte, Nebraska, and died in the emergency room.

Although the area was immediately secured, numerous representatives of the print and electronic media were present by 11:30 p.m., all of whom were demanding information and some of whom were demanding access to the scene of the crime itself. These individuals included representatives of several of the Petitioners, to-wit: the Omaha World-Herald Company, North Platte Broadcasting Co., Associated Press, United Press International, and Petitioner, James Huttenmaier. In addition, word was received that a helicopter, hired or owned by NBC Incorporated, was enroute from Denver, Colorado. This helicopter did, in fact, arrive at the crime scene in the early morning hours of October 19, 1975.

Media representatives were barred access to the crime scene and little information was provided by the Respondent, through Milton R. Larson, Lincoln County Attorney, for the reason that he was not certain of the scope of information which should be made immediately available to the public. However, the name and description of the

suspect, Erwin Charles Simants, were made available to the media immediately after information was obtained, through a criminal investigation, indicating him as a suspect. This information was disseminated by the electronic media to alert area residents concerning the identity of the suspect.

At approximately 8:00 a.m. on October 19, 1975, Erwin Charles Simants was apprehended by the Lincoln County Sheriff and was charged with six counts of murder in the first degree.

On the morning of October 19, 1975, the defendant, Erwin Charles Simants, was arraigned before the County Court and a bail hearing was held. The arraignment was open to the public and several journalists were present, but the evidentiary portion of the bail hearing was closed pursuant to a request by the Lincoln County Attorney. The Constitution of the State of Nebraska, in Article I, Section 9, provides in part "All persons shall be bailable by sufficient sureties, except for . . . murder, where the proof is evident and the presumption is great . . ." At the time of the bail hearing, the Lincoln County Attorney had learned that a confession had been made. Because of the nature of the evidence to be presented to the County Judge in support of the Respondent's request that the defendant be held without bail, a request to close the evidentiary portion of the bail hearing was deemed advisable. The public and press were readmitted for the Court's ruling that defendant should be held without bail.

Following the hearing on the Petitioners' Application for Leave to Intervene in the case and for vacation of the County Court's Restrictive Order, held on October 23, 1975, District Judge Hugh Stuart determined that it would



be advisable to impose certain pre-trial restrictions on publicity; that the County Court's Order was over-broad; and that, though over-broad, the County Court's Order would be adopted by the District Court pending further consideration by the Court of the scope of appropriate temporary restrictions. Judge Stuart requested that Petitioners' attorneys provide him with suggested guidelines in drafting the Order. The Petitioners' attorneys did not respond and on October 27, 1975, Judge Stuart terminated the County Court's Order and substituted his own. Contrary to Petitioners' contention, Judge Stuart did not rely entirely upon "the nature of the crimes charged" in entering his Order. At the time Judge Stuart acted, a restrictive order entered by the County Court was already in existence. Judge Stuart reasonably anticipated that, should he refuse to enter a restrictive order, such refusal may have been interpreted by the news media as a Court determination that anything pertaining to the facts within their knowledge, relative to the case, would be proper for dissemination. The reality of this danger is substantiated by a front-page article written by William Eddy, one of the Petitioners, appearing in the North Platte Telegraph on October 24, 1975. Mr. Eddy, discussed the Nebraska Bar-Press Guidelines, and stated in part,

"There is some question among newsmen as to whether the guidelines cover testimony at a preliminary hearing..."

Therefore it was apparent to Judge Stuart that had the members of the media decided that the guidelines did not cover testimony at a preliminary hearing, all testimony of the witnesses would have been reported.

Relative to that portion of the District Court Order stating "The exact nature of the limitations of publicity

as entered by this Order will not be reported." (Cert. A 9a), its purpose was to preclude the media from doing through negative reporting that which could not be done affirmatively. There is no point in prohibiting the reporting of a confession if it may be reported that one has been made, but may not be spoken of.

#### (b) Post-certiorari Matters

On December 29, 1975, a *Jackson v. Denno*<sup>1</sup> hearing was held on the admissibility of defendant's confession. On motion of the defendant, the hearing was closed to the public and the press. The nature of the testimony necessarily adduced at the hearing, coupled with Petitioners' contention that anything occurring in open Court is "news" which may not be restricted, made clear the necessity of this Order.

Regarding the January 6, 1976, meeting between Judge Stuart and members of the press relative to reporting happenings in the voir dire examination, the areas of concern expressed by Judge Stuart included that (1) there should be no reference to any statements against interest or confessions made by the defendant; (2) no opinions should be expressed concerning the guilt or innocence of the defendant; and (3) no statements should be reported predicting or influencing the outcome of the trial. The newsmen present determined that they could not abide by these conditions and therefore voluntarily excluded themselves from the voir dire examination.

On January 17, 1976, after the return of the verdict of the jury and following their dismissal from duty, the

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<sup>1</sup>378 U. S. 368 (1964).

Court made informal inquiry of the jurors as to whether they could have acted as fair and impartial jurors had they heard that the defendant confessed to his father and mother, his nephew, the State Patrol investigator and the Sheriff. The Court advised that this was just a "straw vote" and that they were released from obligation. In response to that question only one juror indicated that he felt he could have been a fair and impartial juror, even if he had had this information prior to trial. Nine jurors indicated that they could not have acted as jurors in this case had they known of the confessions made by the defendant. The Court then inquired of the jury whether they could have acted as fair and impartial jurors had the text of the confession given to law enforcement officers been known to them prior to the trial. One juror responded affirmatively; eleven jurors responded that they could not have been fair and impartial under those conditions.

### SUMMARY OF ARGUMENT

In this action, the Court is directly confronted with a conflict between the guarantees of the First and Sixth Amendments to the Constitution of the United States and is called upon to draw an accommodation between these two "preferred" Amendments which will preserve a criminal defendant's right to a fair trial without abridging freedom of the press.

The action before the Court is properly designated as a "prior restraint" case. The danger and potential excesses inherent in prior restraints on First Amendment freedoms is readily apparent, and this Court has properly held that such prior restraints come to the Court bearing a heavy presumption against constitutional validity. The

burden of overcoming this awesome presumption should be borne by the Respondent.

Prior restraints on publication and dissemination of news are properly abhorred and should be avoided if reasonable alternatives exist.

It is submitted as indisputable that pre-trial publicity, in certain cases, can irreparably damage a criminal defendant's conceded right to a fair trial. Such publicity can prevent the impaneling of a constitutionally acceptable jury. Not only does there arise the question of the defendant's right to a fair trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution, but a corollary of that right is the right of the people to effective prosecution. If pre-trial publicity precludes the possibility of a criminal defendant's obtaining a fair trial, the injury is to society as a whole, which must necessarily forego the conviction of a person who may well have committed the crime for which he is charged. When absolutely necessary, a limited restrictive order on publicity, designed to preclude such injury, is a step which should be taken by a responsible trial judge.

However, an absolutist view of First Amendment freedoms has never been accepted by this Court. The First Amendment right to freedom of the press is not an inviolate right, precluding all control of publicity which would make improbable the impaneling of a jury, composed of twelve impartial individuals selected from a cross-section of the community in which a criminal offense occurs. The necessary effect of such a ruling would, in exceptional cases, erode the right of society to effective and expeditious prosecution of criminal actions.



The order of the Nebraska Supreme Court now under review by this Court subjected the press to minimal restrictions for the purpose of insuring a criminal defendant his right to a fair trial and was limited to: (1) confessions or admissions against interest made by the accused to law enforcement officials; (2) confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statement, if any, made by the accused to representatives of the news media; and (3) other information strongly implicative of the accused as the perpetrator of the slayings.

In considering the validity of the momentary and narrow prior restraint imposed by the Nebraska trial court, it is pertinent to observe that the order in question applied only to pre-trial proceedings. Most cases before this Court, protecting the press from restrictions on what they may report, have concerned the trial phase of the criminal prosecution; a time when the jurors and witnesses can be otherwise shielded from prejudicial publicity, and also a time when both sides are being heard.

Certain facts, strongly implicative of an accused may be constitutionally restrained from publication by the media prior to his trial including, in appropriate cases, those associated with the circumstances of a criminal defendant's arrest, the accused's criminal record, and certain statements as to the accused's guilt by those associated with the prosecution.

Petitioners suggest that there are always adequate alternatives to a prior restraint of publication in protecting a criminal defendant's Sixth Amendment right to a fair trial. These alternatives will be later discussed and it is submitted that the position is untenable. Although no

litmus paper tests are available, some accommodation of the conflicting interests must be reached, in appropriate cases, keeping in mind the governing principle that the press, in general, is to be free and unrestrained and that the facts it gathers are presumed to be in the public domain.

Clearly, the record, in the instant case, considered in its entirety, justifies the narrow and limited restriction on publicity imposed by the Nebraska Supreme Court for the purpose of insuring the defendant of his right to a fair trial by an impartial jury.

### ARGUMENT

Petitioners' contention that prior restraint on publication is never constitutionally permissible must be analyzed by reviewing the scope of the First Amendment's protection; by reviewing the protection afforded a criminal defendant under the Sixth and Fourteenth Amendments by considering the alternatives available to protect the criminal defendant's Sixth Amendment rights; by examining the instant case to determine whether a "clear and present danger" imperiled the defendant's Sixth Amendment right, absent a restrictive order; and by balancing the defendant's right to a fair trial and society's interest in effective prosecution against the momentary and narrow restriction on First Amendment freedoms imposed upon the press.

#### I.

**The protection afforded to the press by the first amendment is not absolute.**

The basic question raised in this case is whether or not the First Amendment absolutely prohibits prior restraints



on the press as a means of insuring a criminal defendant his Sixth Amendment right to a fair trial before an impartial jury.<sup>2</sup> This question has troubled lower courts, both Federal<sup>3</sup> and State, and now comes squarely before this Court for the first time.

Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for adjudication when they are before the Court for adjudication. . . . One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press and what happens there, to the end that the public may judge whether

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<sup>2</sup>"What transpires in the court room is public property." *Craig v. Harney*, 331 U. S. 367, 374 (1946), and "[o]f course, there is nothing that proscribes the press from reporting events that transpire in the courtroom." *Sheppard v. Maxwell*, 384 U. S. 333, 362-363 (1966). The statement of Mr. Justice Douglas in *Craig* is based on the premise that "a trial is a public event." Of course, the concern of this Court in *Sheppard* was with the "Roman holiday" atmosphere surrounding the trial itself. In the instant case, the order applied only to pre-trial hearings, some of which the defendant could have waived. It should be noted at the outset, that no attempt will be made in this brief to argue the propriety of any restrictive order placed upon the press during a trial. At no time did any Nebraska court enter an order barring publication of any evidence adduced at the trial of Erwin Charles Simants. All orders concerning this case terminated the day the jury was sworn and sequestered.

<sup>3</sup>See e.g. *United States v. Dickinson*, 465 F. 2d 496 (5th Cir. 1972), 476 F. 2d 373 (5th Cir.), cert. denied, 414 U. S. 979 (1973); and *United States v. Schiavo*, 504 F. 2d, 1 (3rd Cir. 1974), cert. denied, 419 U. S. 1096 (1975).

our system of criminal justice is fair and right. On the other hand our society has set apart court and jury as the tribunal for determining guilt or innocence on the basis of evidence adduced in court, so far as it is humanly possible. *Maryland v. Baltimore Radio Show, Inc.*, 338 U. S. 912, 919-920 (1950) (Frankfurter, J., respecting the denial of the petition for a writ of certiorari).

The resolution of the vexatious problem pointed out by Mr. Justice Frankfurter can only be reached by first determining the scope of the First Amendment's protection. The threshold question, then, is whether the First Amendment allows any restriction on the freedom of the press.

If the First Amendment guarantees are absolute and admit of no prior restraints, the problem is resolved and all other rights and interests must be deemed subservient.

If, however, in limited circumstances, prior restraints on First Amendment freedoms are constitutionally permissible, a criminal defendant's Sixth Amendment rights, when necessary, may be preserved by balancing them against the First Amendment rights of the press and, if need be, by narrowly and momentarily circumscribing the right of the press to report every detail of the pre-trial criminal process.<sup>4</sup>

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<sup>4</sup>Mr. Justice Black in *Bridges v. California*, 314 U. S. 252, 260 (1941) correctly stated that ". . . free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." We submit that the instant case requires such a choice, and that some accommodation must be reached in those unique and rare cases where the two rights conflict.

A vigorous and conscientious press is a bulwark of freedom. *New York Times Co. v. United States*, 403 U. S. 713, 716 (1971) (Black, J., concurring). This Court, however, in *Near v. Minnesota*, 283 U. S. 697, 708 (1931), recognized that "Liberty of speech and of the free press is also not an absolute right, and the State may punish its abuse."

This Court has long recognized exceptions to the rule against prior restraints in the area of national security, *Schenck v. United States*, 249 U. S. 47 (1919); obscenity, *Freedman v. Maryland*, 380 U. S. 51 (1965); and "the insulting or 'fighting' words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace", *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (1942). The national security exception, articulated in *Schenck*, supra, was most recently reviewed in *New York Times Co. v. United States*, supra. In that case, seven members of this Court recognized the validity of the *Schenck* exception to the ban on prior restraints, although, the majority of the Court held the prior restraints against publication there involved were invalid.

*Freedman* and *Chaplinsky*, may be recognized as legitimate exceptions to the general prohibition against prior restraints, although they are based on a different footing than is the *Schenck* exception. What was banned in *Chaplinsky* and what might have been banned in *Freedman* had constitutional procedures been followed, was speech *qua* speech. In *Roth v. United States*, 354 U. S. 476, 485, (1957) this Court, per Brennan, J., held that "obscenity is not within the area of constitutionally protected speech or press", (emphasis added). The same, of course, holds true for the "fighting words" prohibited in *Chaplinsky*.

Calling speech "unprotected" does not deny to that speech its essential character as speech. It is apparent that this Court has recognized several exceptions<sup>5</sup> to the general rule prohibiting prior restraints.<sup>6</sup>

There are a number of other instances in which this Court has recognized that the First Amendment cannot be blindly applied, that it is subject to limited qualifications and exceptions, and that these qualifications extend in appropriate cases to prior restraint on the press or on speech.

Perhaps the most obvious of these is the copyright law. Since the founding of the Republic, we have had a copyright law authorizing the courts to grant injunctions against publication. The present provision found in

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<sup>5</sup>Two other possible exceptions to the ban on prior restraints are in the area of "commercial speech". See e.g. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U. S. 376 (1973); and in the area of libel and defamation, See e.g. *New York Times Co. v. Sullivan*, 376 U. S. 254, (1964).

<sup>6</sup>No attempt is being made to compare *Chaplinsky* supra, *Freedman*, supra, *Pittsburgh Press Co.*, supra, or *New York Times Co. v. Sullivan*, supra, with the instant case which restricts that which is concededly protected speech under the Constitution. It is further recognized, that the speech in the above cited cases "has little to do with the political ends of a self-governing society." *New York Times Co. v. Sullivan*, id. at 301 (Goldberg, J., concurring). The above cited cases, other than *Schenck*, supra, are discussed only to illustrate that the First Amendment does not absolutely ban prior restraints on speech *qua* speech or press *qua* press.



17 U. S. C. 101; and 28 U. S. C. 1338 gives the District Courts exclusive jurisdiction of such cases. Cases involving injunctions under the copyright law have been frequent in the federal courts, including this Court. Cf. *Wheaton v. Peters*, 8 Peters 591 (1834); *Folsom v. March*, 9 Fed. Cas. 342 (C. C. Mass.). Even the press has not been adverse to the prior restraint involved in an injunction in such cases. See *International News Service v. Associated Press*, 248 U. S. 215 (1918).

It has also been held that an injunction may be granted involving restraint where an employee of the C.I.A. who has signed an agreement not to make disclosure threatens to publish material without the approval required by that agreement. *United States v. Marchetti*, 466 F. 2d 1309 (4th Cir. 1972), cert denied, 409 U. S. 1063 (1972) and on appeal from remand, *Alfred A. Knopf, Inc. v. Colby*, 509 F. 2d 1362 (4th Cir. 1975), cert. denied, 421 U. S. 922 (1975).

Another form of prior restraint has been recognized in decisions involving cease-and-desist orders issued by regulatory agencies in enforcement of federal regulatory statutes. Thus in *FTC v. Texaco, Inc.*, 393 U. S. 223 (1968), this Court ordered enforcement of an order of the Federal Trade Commission restraining Texaco from using "any . . . device, such as, but not limited to, . . . dealer discussions . . ." *FTC v. Texaco, Inc.*, No. 24, October Term, 1968, Appendix Vol. I, p. 231.

Similarly, in *Sinclair Co. v. N.L.R.B.*, reported Sub. Nom. *N.L.R.B. v. Gissel Packing Co.*, 395 U. S. 575 (1969), this Court upheld, against "petitioner Sinclair's First Amendment challenge" (395 U. S. at 616), the Board's setting aside of a representation election because of coercive communications by the employer to its employees during the

election campaign. The Court unanimously affirmed the judgment of the Court of Appeals enforcing the Board's order, which included a provision requiring Sinclair to cease and desist from "[t]hreatening the employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment, or with any other economic reprisals, if they were to select the above-named, or any other, labor organization as their collective-bargaining representative." *Sinclair Co. v. N.L.R.B.*, No. 585, October Term, 1969, App. 199.

In its opinion in *Sinclair*, the Court specifically recognized that the freedom of speech granted to the employer is subject to the limited restriction necessary to protect "the equal rights of the employees to associate freely . . ." (395 U. S. at 617). Similarly, here, the correlative rights of the press under the First Amendment should be subject to restrictions, limited in scope and in time, designed to protect the constitutional right of the accused to an impartial jury and a fair trial.

Indeed, restrictions on freedom of speech are an everyday occurrence in trials in our state and federal courts, both civil and criminal. Whenever a court excludes from testimony the answer to a question on the ground of hearsay, or because of some other rule of evidence, such as the *Miranda* ruling in the case of oral testimony about a confession, the witness is deprived of his freedom of speech. This is done in many cases because the rule of evidence, like the hearsay rule, is designed to keep the jury from hearing certain information which has been determined by appropriate rule of law to be so prejudicial as to interfere with a fair trial. It would make no difference if the witness said "But I want to speak, and I assert my First Amendment right, which is absolute." If the rule of law



excluding the evidence is applicable, he may be properly subjected to a prior restraint. This is a clear case of the right of free speech yielding to rules designed to provide a fair trial.

Reference may also be made to the decisions of this Court upholding the "fairness doctrine" in television broadcasting *Red Lion Broadcasting v. F.C.C.*, 395 U. S. 367 (1969) and sustaining the determination of the Federal Communications Commission that television stations are not constitutionally required to sell broadcasting time for the presentation of views on controversial issues. *Columbia Broadcasting System v. Democratic National Committee*, 412 U. S. 94 (1972). In both cases, the special situation of broadcasting, being dependent upon the use of limited public facilities (the air waves) was taken into account in determining claims based on the First Amendment. Cf. *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974) where a different result was reached because of the absence of such a special consideration in the weighing or evaluation of the First Amendment claim.

Finally, this Court's recent decision in *Buckley v. Valeo*, No. 75-436, decided January 30, 1976, is relevant. In that case, involving the Federal Election Campaign Act of 1971, the Court weighed issues under the First Amendment and drew an undoubtedly delicate distinction between limitations on contributions, which were upheld, and limitations on expenditures, which were held invalid. In reaching the former conclusion, the Court held that (Slip Op. p. 24):

the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1000 contribution ceiling.

Similarly, here, we contend that the "weighty interests" involved in protecting the right to an impartial jury and a fair trial are sufficient to justify the "limited effect upon First Amendment freedoms" involved in the restrictive order here, which, as provided by the court below, was limited in scope and in duration to highly prejudicial publicity before the trial, at a time when there was no other way to protect prospective jurors from information which they could not fairly be expected to ignore.<sup>7</sup> Without this, there could be no impartial jury in Lincoln County, and, considering the saturation of publicity through radio, television, and the newspaper, in any other county in Nebraska.

It is not suggested that the several examples given in the previous pages of this brief are indistinguishable from the present case. All of these cases arise on varying facts, and involve different aspects of the problem. Each of the instances given does, however, hold that the First Amendment is not an absolute, that it does not take precedence over all other constitutionally secured rights, and that, in appropriate cases, the rights established by the First Amendment must be brought into harmony with

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<sup>7</sup>The limited period of the restraint in this case finds an analogy in *United States v. Thirty-Seven Photographs*, 402 U. S. 363 (1971), where this Court found that a restraint of 74 days was not constitutionally excessive. See also *United States v. Reidel*, 402 U. S. 351 (1970). It is true that obscenity is not within the scope of First Amendment protection. However, when the issue is whether the item is or is not obscene, some of the items may constitute protected expression. Restraint on their publication for the limited period necessary to decide the issue was upheld by this Court, though an unlimited restraint would have been invalid.

equally important guarantees found in other parts of the Constitution.

Prior restraints on expression come to this Court with a heavy presumption against their validity. *New York Times Co. v. United States*, supra, at 714, *Organization for A Better Austin v. Keefe*, 402 U. S. 415, 419 (1971); *Carroll v. Princess Anne*, 393 U. S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70 (1963). Since the prohibition against prior restraints only reaches the level of a presumption,<sup>8</sup> it may be rebutted, and further exceptions may be recognized by this Court. Indeed, Chief Justice Burger, in his dissenting opinion in *New York Times Co. v. United States*, supra, stated:

Of course, the First Amendment right itself is not absolute, as Justice Hughes so long ago pointed out in his aphorism concerning the right to shout "fire" in a crowded theater if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near v. Minnesota*. *There are no doubt other exceptions no one has had occasion to describe or discuss.* 403 U. S. at 749; (emphasis added.)

One of these "other exceptions" should arise when the First Amendment prohibition against prior restraints on the press comes directly into conflict with cherished individual freedoms guaranteed by another amendment to our Constitution.

The First Amendment, after all, is only one part of an entire Constitution . . . Each provision of the Con-

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<sup>8</sup>Mr. Justice White, concurring in *Miami Herald Publishing Co. v. Tornillo*, supra, speaks of the First Amendment erecting "a virtually insurmountable barrier between government and the print media." When read in context, we take this as establishing the same criterion as a "heavy presumption against validity."

stitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. *New York Times Co. v. United States*, supra at 761 (Blackmun J., dissenting.)

## II.

**The Nebraska Supreme Court was correct in determining that the heavy presumption against the validity of prior restraints on the press had been overcome in this action.**

The issue in the instant case cannot be resolved merely by labeling the restrictive order a prior restraint and concluding a fortiori that the order was invalid. As this Court said in *Kingsley Books v. Brown*, 354 U. S. 436, 441-442 (1957):

The phrase "prior restraints" is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: "What is needed," writes Professor Paul A. Freund, "is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis." *The Supreme Court and Civil Liberties*, 4 Vand L. Rev. 533, 539.

This "particularistic analysis," suggested by Professor Freund requires (1) a review of the protection provided to a criminal defendant's Sixth Amendment rights; (2) a determination of whether a true conflict exists between Sixth and First Amendment rights, and (3) whether this conflict creates a "clear and present danger" to Sixth Amendment rights such as would call for a balancing be-



tween the harm to the defendant and society if no restrictive order is issued and harm to the press caused by imposition of a temporary and narrow restrictive order on publication.

**A. Pre-Trial Publicity May Profoundly Effect A Criminal Defendant's Right To A Fair Trial.**

The Sixth Amendment guarantees to a criminal defendant not only the right to a public trial, but also to a fair trial by a panel of impartial jurors. *Turner v. Louisiana*, 379 U. S. 466 (1965); *Irvin v. Dowd*, 366 U. S. 717 (1961); *In re Oliver*, 333 U. S. 257 (1948). The purpose of a public trial is to guarantee the accused that he will be dealt with fairly and not unjustly condemned. *Estes v. Texas*, 381 U. S. 532, 538-539 (1965).

A trial is no less "public" because a restrictive order is imposed upon the press. Naturally, the entire public cannot be present in Court, and the press supplies much valuable information to those unable to attend judicial proceedings. However "[w]hile maximum freedom must be allowed the press in carrying on this important function in a democratic society, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process." *Estes*, *id.*, at 539.

"Absolute fairness" demands affirmative action to insure protection of a criminal defendant's Sixth Amendment rights. *Sheppard v. Maxwell*, 384 U. S. 333 (1966). It devolves upon the trial Court to take those steps necessary to insure that the case is decided by an impartial jury which considers only that evidence which is adduced at trial. A criminal defendant's right to a public trial is not impaired by a momentary and narrow restriction against publication by the press when necessary to insure juror

impartiality. This is especially apparent where the defendant himself has joined in a request for such a restrictive order. As has been noted "the right of 'public trial' is not one belonging to the public, but one belonging to the accused . . ." *Estes*, *supra* at 539, Harlan, J., concurring.<sup>9</sup>

<sup>9</sup>It must be noted that this restrictive order applied to evidence adduced at pre-trial hearings held in open Court. The right to a Preliminary Hearing is a right belonging to the accused. He may waive the Preliminary Hearing should he desire. However, if it is impossible to restrict prejudicial coverage, a criminal defendant, if he chooses to exercise his right to a Preliminary Hearing, may prejudice his right to a fair trial. In addition, by virtue of the evidence which the State may be required to submit at the Preliminary Hearing in order to obtain a bind over to the District Court, the right of the citizens of the State of Nebraska to effective prosecution as a result of prejudicial publicity emanating from testimony adduced at the Preliminary Hearing, may also be frustrated. If the defendant, on the other hand, chooses to waive a Preliminary Hearing he may be precluded from raising, on appeal, the legal question of "probable cause" for his arrest and detention. In the instant case, the exercise of defendant's right to a Preliminary Hearing, in the absence of a restrictive order, was potentially detrimental to the case of the State of Nebraska. In the absence of a restrictive order, the prosecution would have been required to choose between the possibility of not adducing enough evidence to insure the bind over or possibly paving the way for a mistrial due to prejudicial pre-trial publicity through introduction of additional evidence. It is respectfully submitted that neither the right of the defendant to a Preliminary Hearing nor the right of the State of Nebraska to effective enforcement of its laws should be impaired by prejudicial coverage by the media.

Since the right to a "public trial", is one belonging to the defendant, some question remains as to whether the



The steps outlined in *Sheppard* to mitigate the effect of prejudicial publicity were focused on the conduct of the trial itself. Where circumstances preclude the use of these steps, the duty of the trial judge is not extinguished, but should lead him to enter those orders necessary to prevent prejudices. "Our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U. S. 133, 136 (1955). If it is constitutionally impermissible for a trial judge to enter a restrictive order on publicity when all other alternatives are to no avail, there would arise that great "probability of unfairness". Such an interpretation of the Sixth Amendment would be self-defeating in that by guaranteeing a public trial, the Court would, thereby, be denying the defendant his right to an impartial jury, and the Sixth Amendment right to a fair trial would become a hollow promise.

Certainly, the impartial jurors required by the Sixth Amendment need not be totally ignorant of the facts and issues involved in a criminal case. *Murphy v. Florida*, 421 U. S. 794 (1975). The state of the art in print and electronic journalism is such that available information tends to the point of saturation. Citizens of a community are, and should be, aware of many newsworthy facts surrounding major cases. Drawing a jury panel from this informed citizenry does not in itself create prejudice. However, this Court has held that certain information is so inherently prejudicial, that the denial of a motion for a change of venue violates due process. *Rideau v. Louisiana*, 373 U.

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pre-trial hearings could have been closed to the public. This question was not fully resolved by the Nebraska Supreme Court and is not now an issue before this Court.

S. 723 (1963).<sup>10</sup> In that case, the defendant's confession was shown over television.

. . . [T]he conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial at which he pleaded guilty to murder. Any subsequent court proceeding in a community so pervasively exposed to such a spectacle could be but a hollow formality. *Rideau*, id. at 726.

The restrictive order in the instant case that barred the reporting of the existence of confessions made by the defendant, Erwin Charles Simants, prevented the same prejudicial effect which caused the reversal in *Rideau*. The fact that no confession was actually televised, and the fact that there was no "spectacle", does not detract from the possible impact on prospective jurors who would have learned that there was, indeed, a confession. The difference presented is only one of degree. The confession in *Rideau*, was televised in a large community. In the instant case, the existence of a confession would have been made known in a small rural community. By comparing the size of the respective communities from which prospective jurors may be drawn, it is clear that the prevented disclosure in the instant case takes on characteristics of the disclosure in *Rideau*, and the potential impact of the publicity in each case becomes more closely balanced.

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<sup>10</sup>Normally "the burden of showing essential unfairness as a 'demonstrable reality' is on the defendant." *Sheppard v. Maxwell*, supra, at 383, quoting *Adams v. United States, ex rel. McCann*, 317 U. S. 269, 281 (1942). However, this Court has recognized that circumstances can create an inherent prejudice so great that the burden need not be met. *Sheppard v. Maxwell*, supra; *Estes v. Texas*, 381 U. S. 532 (1965); *Turner v. Louisiana*, supra; *Rideau v. Louisiana*, supra; *Irvin v. Dowd*, supra.

Regardless of any differences between the instant case and *Rideau*, one essential reality remains "You can't forget what you see and hear." *Irvin v. Dowd*, supra at 728. Jurors are human beings. They are, no doubt, influenced by the publicity they are subjected to. The strength of that influence is a matter of degree depending on the quality and quantity of information they receive.

Professors Padawer-Singer and Barton performed numerous controlled experiments to determine the possible impact on jurors of news stories in a major criminal case which contained information concerning the defendant's previous criminal record and alleged retracted confession. The results of that experiment established that newspaper stories containing such information had a definite impact on experimental juries. The results indicated that not all unfavorable publicity is damaging, but a serious problem exists in the area of information as to previous criminal record and alleged retracted confessions.<sup>11</sup>

Experiments, such as that performed by Professors Padawer-Singer and Barton provide empirical data but do not prove conclusively the effect of pre-trial publicity on actual jurors. Indeed, the infinite variables inherent in any sociological study make conclusiveness an unattainable goal. However, in the instant case, the post-trial questioning of the actual jurors leaves little doubt that in this specific case, with this specific jury, pre-trial publicity in a form that would have established the existence of a confession would have had a greatly prejudicial effect. At least nine of the twelve jurors indicated that they would

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<sup>11</sup>Simon *The Jury System in America* 125.

have been unable to serve on the jury had they known of the existence of a confession.<sup>12</sup>

*Sheppard v. Maxwell*, supra; *Estes v. Texas*, supra; and *Rideau v. Louisiana*, supra, all recognize the danger inherent in giving totally free reign to the press. None of these cases sanctioned the use of restrictive orders upon the press to insure the defendant his fair trial.<sup>13</sup> How-

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<sup>12</sup>On January 17, 1976, following release of the Jury in the case before the Court, Judge Stuart made the following inquiry:

THE COURT: Now, how many of you feel that had you this information, that he had made these confessions, how many of you could not have acted as jurors in the case? Would those hold up their hands? (Thereupon, nine members of the jury held up their hands.)

THE COURT: All right. Now then, had the text of the confession been published in the newspapers, the confession that was given to Officer Grieb and to Sheriff Gilster, in the preliminary hearing that was introduced, not the tape itself but the type-written text of what was in there was introduced in evidence as being a copy of the confession, if this had been run in the paper, the text of the confession that was given to Officer Grieb and Sheriff Gilster, how many of you then would have been able to take an oath that you could be a fair and impartial juror in the case if you had already read the confession?

(Thereupon, Mr. Richard Anderson, the Foreman of the jury held up his hand.)

THE COURT: One. How many could not, had you already read the confession?

(Thereupon, 11 members of the jury held up their hands.)

THE COURT: Eleven. Thank you. . .

<sup>13</sup>The Court in *Estes* and *Sheppard* was not dealing with cases involving matters based purely on pre-trial publicity. Although the abuses in both cases did include persuasive



ever, it has been stated that "[T]he courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Sheppard*, supra at 365. Further, Mr. Justice White, in *Branzburg v. Hayes*, 408 U. S. 665, 685 (1972), indicated that "they (newsmen) may be prohibited from attending or publishing information about trials if such restrictions are necessary to insure a defendant a fair trial before an impartial tribunal." If no alternatives to the issuance of a restrictive order exist, it would seem that a trial judge in a criminal case is bound to enter some form of an order to insure the defendant his right to a fair trial before an impartial jury.<sup>4</sup>

**B. In The Instant Case, No Reasonable Alternatives To The Imposition Of A Prior Restraint On The Press Existed.**

To demand that a trial court attempt ineffectual alternatives to a restrictive order would be to give rise to an exaltation of form over substance. There is no question that the solution least offensive to First Amendment freedoms must be employed to protect a criminal defendant's right to a fair trial. However, absent effectual alternatives, a momentary and limited restrictive order on publication should issue.

It has been suggested that there is no conflict between the right of the press to publish under the First Amendment and a criminal defendant's right to a fair trial under the Sixth Amendment. With this general contention, we are in agreement. Certainly any conflict that arises is

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and sometimes prejudicial pre-trial publicity, the cases turned on events that transpired during the trial itself.

borne of an exceptional case. This fact is admitted in the Brief of Petitioners wherein they state:

Except in the most exceptional case, carefully selected jurors are fully able to exercise their independent judgment of guilt or innocence based on the evidence introduced in Court, whether or not they have read or heard about the case beforehand. (p. 30).

It is submitted that the brutal slaying of six people in a rural Nebraska community, with sexual assaults on children and an elderly woman before and after death, necessarily falls in the classification of an exceptional case.

It is suggested that *Sheppard v. Maxwell*, supra, is dispositive of the fact that a prior restraint on publication may never issue and as setting forth reasonable alternatives to such prior restraint which may be utilized by the Court. In this conjunction, the Court in *Sheppard*, at 362-363, stated as follows:

From the cases coming here we note that unfair prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial court must take strong measures to insure that the balance is never weighed against the accused. The appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings



threatens the fairness of the trial, a new trial should be ordered but we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. . . . Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the Habeas Petition.

*Sheppard* clearly imposes a duty upon the trial judge and officers of the court to preclude frustration of the judicial process.

*Sheppard* suggests that a possible alternative to prior restraint of publication is a continuance of the trial date. This solution does not acknowledge the criminal defendant's constitutional right to a speedy trial and the prosecution's statutory obligation to bring the matter to trial within six months.<sup>14</sup> Further, Nebraska law requires that the trial of a criminal case shall be given preference over civil cases, and that the trial of a defendant who is in custody and whose pre-trial liberty is reasonably believed to present unusual risk must be given preference over other criminal cases.<sup>15</sup> The defendant in the instant case was held

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<sup>14</sup>Neb. Stat. 29-1207, R. S. Supp. 1974.

<sup>15</sup>Neb. Stat. 29-1205, R. S. Supp. 1974.

without bail and the trial, therefore, was held at the earliest possible date. Recognizing these constitutional and statutory obligations, the trial judge set a January 5, 1976, trial date. Because of the necessity of an early trial date, and in view of the great interest expressed in this case both regionally and nationally, the position that adverse effects of pretrial publicity could have been substantially reduced by a continuance lengthening the cooling off period between arrest and trial is untenable.

Even in the absence of a continuance is it not possible that the passage of time before the trial would have destroyed much of the prejudicial effect of pre-trial publicity? A review of local news coverage reveals that scarcely a single day passed between the occurrence of the crime and the conclusion of the trial, wherein there was not a report of the progress of this action in the North Platte Telegraph. This newspaper is the paper of general circulation throughout Lincoln County and surrounding communities. The crime, certainly being newsworthy and being put before the people each day, did not lessen in importance as time went by, but rather became of greater importance to the people of this community.

*Sheppard* also suggests that a motion for change of venue could be made and sustained as a tool to be used by the court in minimizing the effects of adverse pre-trial publicity. Nebraska law<sup>16</sup> permits change of venue only to a county adjoining the county in which the crime was committed. Defendant did, in fact, move for a change of venue in the action before the Court and this motion was opposed by Respondent on the basis that limitations on pre-trial coverage had been effective and further that,

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<sup>16</sup>Neb. Stat. 20-1301, R. S. Supp. 1975.

if defendant's right to a fair trial had been prejudiced in Lincoln County, a change of venue to an adjoining county would be ineffectual to remedy the problem. All adjoining counties are smaller than Lincoln county and are served by many of the same television and radio stations, newspapers and wire services. Further, Petitioners include the Omaha World-Herald Co. which publishes a newspaper of general circulation for the entire State of Nebraska; United Press International, and Associated Press, both national organizations for the dissemination of news not only in Nebraska but throughout the entire county, and the Nebraska Broadcasters Association, the State organization of broadcasters. The pre-trial publicity this case received was not localized in Lincoln County, but pervaded the entire State of Nebraska and the nation itself.

Given the legitimate desire of these powerful organizations to report the tragic event which took place in Lincoln County and is the subject of this action, and given the public exposure inherently possessed by these instrumentalities of dissemination, it would appear that the limited restrictive order entered by the Supreme Court of Nebraska to preclude widespread pre-trial publicity of an inflammatory and prejudicial nature was essential.

Instructions from the court have been suggested as an alternative to the issuance of a restrictive order. Instructions cannot remove prejudice once it has been engrained in the mind of the potential juror. Such instructions are only effective if given to a jury which was not seated with an established predisposition toward guilt or innocence.

The projected alternatives of reversals or new trials cannot properly be considered alternatives to a trial judge.

They exist only to insure that the pre-trial publicity does not unduly prejudice a criminal defendant. The trial judge must enter whatever orders are necessary to secure the criminal defendant his right to a fair trial by an impartial jury. A trial judge who would refuse to enter a restrictive order in a necessary case because any prejudice arising from pre-trial publicity could presumably be corrected on appeal would abuse his discretion and the appellate judicial process.<sup>17</sup>

The supposed remedies of sequestration of witnesses, admonitions to the jury to disregard media coverage, and sequestration of juries, are directed to the conduct of the trial itself and can have no effect on prejudicial pre-trial publicity. The use of voir dire examination to detect the existence of prejudice arising from extensive publicity and thus insure avoidance of prejudice to criminal defendants has inherent limitations.

We submit that the absolutist concept as it generally applies to the First Amendment, is not supported by the law and as it applies to freedom of the press specifically is untenable because it denies that locale and circumstance can combine with extensive and detailed publicity to create an atmosphere in which the fair administration of justice is frustrated.

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<sup>17</sup>Is it a satisfactory resolution of the problem to protect 'the prisoner' in plying his trade, but—because the first trial was 'poisoned'—put the state to the trouble and expense of a second trial years after the event, and subject the accused to the ordeal of a second trial—which again may be 'poisoned'?" Hall, Kamisar, LaFave and Israel, *Modern Criminal Procedure* 1145 (1969).



**C. The Clear And Present Danger Test Was Properly Applied In The Instant Case.**

. . . [F]reedom . . . of the press should not be impaired . . . unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice. *Craig v. Harney*, supra at 373.

The line of cases leading up to and including *Craig* dealt with the propriety of contempt citations issued for the publication of material that the trial courts considered a threat to the administration of justice.<sup>18</sup> Although *Craig*, *Bridges v. California*, supra, and *Pennecamp v. Florida*, 328 U. S. 331 (1946), resulted in reversals of the lower court's finding of contempt, this Court, in all three cases, employed the "clear and present danger" test.

In *Bridges*, Mr. Justice Black, after discussing the practical application of the test and the scope it should be afforded, concluded:

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. 314 U. S. at 263.

The loss of a criminal defendant's Sixth Amendment rights must certainly be considered a "substantive evil."

"The clear and present danger" to be arrested may

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<sup>18</sup>Although, these cases did not deal directly with prior restraints, the possibility of contempt citations being issued for publishing certain matters may have a chilling effect upon the exercise of the First Amendment guarantees. In any court action which impinges on the First Amendment rights of the press, the proper test to be applied should be the "clear and present danger" test.

be danger short of a threat as comprehensive and vague as a threat to the safety of the republic or "the American way of life" . . . Among "the substantive evils" with which legislation may deal is the hampering of a court in a pending controversy, because the fair administration of justice is one of the chief tests of the true democracy. *Pennecamp*, supra, at 353, (Frankfurter J., concurring.)

A "clear and present danger" exists if pre-trial publicity impairs the protection of Sixth Amendment rights possessed by a criminal defendant. The fact that it is a single individual who is affected does not diminish the evil, for our country was founded on democratic principles recognizing that individual rights must be zealously safeguarded.<sup>19</sup>

In the instant case there were no alternatives available to the trial court. The threat posed by highly prejudicial pre-trial publicity as it affected the defendant's fair trial process was both "substantial" and "imminent". The trial court, acutely aware of the situation concerning publicity, reactions of the community, and the gravity and brutality of the crime, made the determination that a "clear and present danger" existed. Further, the trial judge was confronted with the statement, made by one of Petitioners' attorneys, that by virtue of the publicity that had already been printed, it would be impossible for a trial to be had in Lincoln County in any event. In this statement Peti-

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<sup>19</sup>The Founding Fathers' concern for the individual was underscored by George Mason's refusal to support ratification of the Constitution because it did not contain guarantees of individual rights. Shortly after Mason's action, the Bill of Rights was ratified, which insured that the central government would not tamper with those rights basic to a free people.



tioners admit the existence of a "clear and present danger" and the trial court properly considered it.

In this case, it is not the dignity of judges nor the decorum of the courtroom that was substantially and imminently threatened. The threat was to a fundamental right guaranteed by the Constitution to a criminal defendant that he shall have a fair trial. The trial judge properly applied the "clear and present danger" test to the circumstances of the instant case and determined that there was an imminent danger that those substantial Sixth Amendment rights would be imperiled if a restrictive order was not entered.

On appeal, under the standard of "clear and present danger," the Nebraska Supreme Court also took such steps as it deemed necessary to insure an orderly disposition of this case. The nature and underlying circumstances of the crime charged, the attendant publicity, and the lack of workable alternatives made it imperative that the Court take necessary steps to eliminate the "clear and present danger" by the issuance of a limited restrictive order which, in light of the circumstances, was not only constitutionally permissible but was necessary to insure the protection of the fundamental rights at issue.

**D. When Rights Guaranteed By Two Amendments Conflict, That Right Which is Least Restricted Must Give Way to the Other.**

If a "clear and present danger" exists which threatens the Sixth Amendment right of a criminal defendant, an accommodation must be made between those rights and the rights of the press under the First Amendment. This

accommodation is reached by balancing the prospective injury to the rights and interests of the criminal defendant and society against the prospective injury to the rights and interests of the press.

Absent a restrictive order, a criminal defendant may be convicted and, in the instant case, condemned to death because pervasive and prejudicial pre-trial publicity influenced the jurors. It is argued that the conviction may be reversed or set aside. However, "reversals are but palliatives." *Sheppard v. Maxwell*, supra, at 363. Furthermore, a reversal is meaningless if the case is to be remanded to the same jurisdiction in which the defendant was first convicted. That which caused the prejudicial effect, namely the disclosure of a confession or highly implicative facts, would still be in the public domain and within the knowledge of potential jurors. In certain circumstances, as existed in the instant case, once the damage of disclosure has occurred, it is permanent. Unless a restrictive order is entered to protect the criminal defendant's Sixth Amendment rights, those rights may be totally and permanently extinguished.

Societal interests must also be considered in the accommodation and balancing. Only by protecting the individual can society protect itself and assure all citizens that they will receive the protection of the Sixth Amendment, if and when it is needed. Further, society has an indisputable interest in seeing that the fair administration of criminal justice is carried out. If a restrictive order may not issue in a proper case, society is denied its protection from criminal activity because, not only may a guilty man be allowed to go free,<sup>20</sup> but also an innocent

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<sup>20</sup>The contention that it is better that a guilty man go free

man may be convicted unjustly, allowing the individual who was guilty of the crime to remain free in society.

Certainly, freedom of the press is vitally important to a democratic society and only in rare circumstances should limits be placed on the news media.

"Without a free press, there can be no free society. Freedom of the press, however, is not an end in itself, but a means to the end of a free society." *Pennecamp v. Florida*, supra, at 354 (Frankfurter, J., concurring).

It is precisely in those limited and rare cases where a "clear and present danger" exists that, absent a restrictive order, one guarantee of a free society, the right to a fair trial, is threatened. In those circumstances the press may be narrowly and temporarily circumscribed from reporting that which takes place in open court at pre-trial hearings.<sup>21</sup>

than the press be limited, grants to the press absolute freedom, while denying its responsibility. As argued above, this court has never adopted an absolutist position concerning the First Amendment guarantee of a free press. The press exists to provide the widest dissemination of information possible to the people. In this respect, the press is protected by the First Amendment as an institution. This institution, however, exists to serve the people. Service requires responsibility, and the publication of information that may have the effect of so influencing the fair administration of justice that a guilty man would be allowed to go free, denies that responsibility.

<sup>21</sup>This position is not undermined by the decision in *Times-Picayune Publishing Corp. v. Schullingcamp*, 419 U. S. 1310 (1974) or *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469 (1975). In *Times-Picayune*, the order which was stayed by Mr. Justice Powell was not entered until 11 months after the commission of the crime and after the publicity surrounding it had subsided. Further, the order was to remain in effect until the trial had terminated.

The rights of the criminal defendant and the rights of society may be permanently injured in an exceptional case absent a constitutionally permissible restrictive order. The press, on the other hand will be restricted, but that restriction will be for a relatively short period of time and will be narrow and limited in scope.

In the instant case, it can readily be seen that Erwin Charles Simants, the defendant, could not have received a fair trial absent the restrictive order imposed. The injury to the people of the State of Nebraska would have been a denial of the fair administration of justice while the press was only limited in reporting the existence of a confession or statement against interests and other facts highly implicative of the defendant for the period prior to trial.

No restriction on the press can be lightly dismissed as not being overly burdensome, but in exceptional cases, when balancing the rights of the defendant to a fair trial and society's interest in effective law enforcement against the right of the press to immediacy in coverage, the latter must yield.

### III.

**The issuance of a restrictive order is supported by the record.**

The *per curiam* opinion of the Nebraska Supreme Court

Thus, *Times-Picayune* is clearly distinguishable from the instant case, in that, no "clear and present danger" was shown, and the order itself was extremely broad. *Cox Broadcasting* is inapposite, because the statute under which the court action was brought against Cox Broadcasting did not deal with a constitutionally protected right. In the instant case, of course, there is a direct conflict between two amendments of the Constitution.



pointed out that one of the factors involved in determining whether a restrictive order should issue is the "trial court's own knowledge of the surrounding circumstances."<sup>22</sup> This Court in *Sheppard v. Maxwell*, supra, observed that a trial court could raise the issue of sequestration with counsel, *sua sponte*, if it were necessary to do so. The knowledge of the surrounding circumstances that a judge brings with him to the bench may also be the basis of other actions taken to protect a criminal defendant's Sixth Amendment rights. Certainly, a trial judge must act to protect the rights of a criminal defendant whether or not the prosecution or the defense make any attempt to do so. To hold otherwise would be to assume that the trial judge's responsibility is obviated by the intransigence of counsel. Therefore, the trial judge is not limited in making his determination to the introduction of evidence that shows the existence of a "clear and present danger" but may consider other indices of which he is aware.

The Nebraska Supreme Court further alludes to the lack of viable alternatives to a restrictive order in discussing the Nebraska statutes dealing with change of venue<sup>23</sup> and

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<sup>22</sup>Cert. A 61a.

<sup>23</sup>In its discussion of change of venue, the Court gives population figures for Lincoln County and the counties to which venue could legally be changed. Petitioners apparently contend that there are 82,000 potential jurors. This is a false assumption of course, since jurors are chosen from the list of registered voters. The 82,000 figure represents total population including children. Furthermore, the number of potential jurors is not determined by the sum of all registered voters within Lincoln County and the surrounding counties, but is determined by the number of registered voters within the county where the case is actually tried.

the necessary prosecution of a criminal defendant within six months.<sup>24</sup> The record before the Court<sup>25</sup> indicates that a high probability of injury to the defendant's Sixth Amendment rights created a "clear and present danger," and that finding properly formed the basis of the restrictive order entered by the Nebraska District Court affirmed, as modified, by the Nebraska Supreme Court.

#### IV.

##### Mootness.

The controversy in question ordinarily would have become moot when the jurors in the case of *State v. Simants* were sworn and sequestered on January 7, 1976. At that time, all orders prohibiting the publication of confessions, statements against interest, and other facts highly implicative of the defendant terminated.

However, we recognize Petitioner's arguments against mootness as being a sound exposition of the law concerning those controversies "capable of repetition, yet evading review." *Pacific Terminal Co. v. I.C.C.*, 219 U. S. 498, 515 (1911). Further, we recognize that guidance in this most difficult area is needed to eliminate the confusion of which the Petitioners speak; a confusion which affects courts and prosecutors in their assigned tasks, as well as publishers and broadcasters. Whether in these circum-

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<sup>24</sup>Cert. A 59a-60a.

<sup>25</sup>Of necessity, the record contains language couched in speculation. No one can determine to a certainty the potential impact of actual pre-trial publicity. However, when pre-trial publicity creates a high probability of injury to Sixth Amendment rights, a restrictive order is warranted.



stances it is appropriate for the Court to proceed is surely a matter for the Court's determination.

### CONCLUSION

The administration of criminal justice in the United States demands that the press generally be allowed to publish freely all matters transpiring in open court. The news media is an important guardian for the people to insure the proper functioning of the judicial system. However, the administration of criminal justice also demands that in certain circumstances, when a "clear and present danger" exists, pre-trial publicity must be limited in order to insure the right of a criminal defendant to an impartial jury as guaranteed to him by the Constitution of the United States.

We submit that because no alternatives existed the imposition of the restrictive order entered by the District Court of Lincoln County, Nebraska, affirmed as modified by the Nebraska Supreme Court, was constitutionally justifiable and proper and should be affirmed.

Respectfully submitted,

MILTON R. LARSON

JOHN P. MURPHY

Lincoln County Attorney's Office  
Lincoln County Courthouse  
North Platte, Nebraska 69101

ERWIN N. GRISWOLD

JONES, DAY, REAVIS & POGUE  
1100 Connecticut Avenue N.W.  
Washington, D. C. 20036  
*Attorneys for Respondent, State  
of Nebraska*

MAR 11 1976

MICHAEL RODAK, JR., CLERK

In The  
**Supreme Court of the United States**

October Term 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA  
WORLD-HERALD COMPANY; THE JOURNAL-  
STAR PRINTING CO.; WESTERN PUBLISHING  
CO.; NORTH PLATTE BROADCASTING CO.; NE-  
BRASKA BROADCASTING ASSOCIATION; AS-  
SOCIATED PRESS; UNITED PRESS INTERNA-  
TIONAL; NEBRASKA PROFESSIONAL CHAPTER  
OF THE SOCIETY OF PROFESSIONAL JOUR-  
NALISTS/SIGMA DELTA CHI; KILEY ARM-  
STRONG; EDWARD C. NICHOLLS; JAMES HUT-  
TENMAIER; WILLIAM EDDY,

*Petitioners,*

vs.

THE HONORABLE HUGH STUART, JUDGE, DIS-  
TRICT COURT OF LINCOLN COUNTY, NE-  
BRASKA; ERWIN CHARLES SIMANTS, INTER-  
VENOR; AND THE STATE OF NEBRASKA,  
INTERVENOR,

*Respondents.*

On Writ of Certiorari to the  
Supreme Court of the State of Nebraska

**BRIEF OF RESPONDENT HUGH STUART**

PAUL L. DOUGLAS  
Attorney General of Nebraska

HAROLD MOSHER  
Assistant Attorney General

State of Nebraska  
2115 State Capitol  
Lincoln, Nebraska 68509

*Attorneys for Respondent Stuart*

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In The  
**Supreme Court of the United States**

October Term 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD COMPANY; THE JOURNAL-STAR PRINTING CO.; WESTERN PUBLISHING CO.; NORTH PLATTE BROADCASTING CO.; NEBRASKA BROADCASTING ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS INTERNATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY,

*Petitioners,*

vs.

THE HONORABLE HUGH STUART, JUDGE, DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA; ERWIN CHARLES SIMANTS, INTERVENOR; AND THE STATE OF NEBRASKA, INTERVENOR,

*Respondents.*

On Writ of Certiorari to the  
Supreme Court of the State of Nebraska

BRIEF OF RESPONDENT HUGH STUART

BRIEF OF THE HONORABLE HUGH STUART, JUDGE  
DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA

OPINIONS AND ORDERS BELOW

The respondent herein agrees with the statement made in petitioners' brief with regard to the opinions and orders below.



## JURISDICTION

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. The jurisdiction of this Court was invoked pursuant to 28 U. S. C. § 1257 (3) (1973).

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## QUESTIONS PRESENTED

1. Whether freedom of the press as outlined in the First Amendment to the Constitution of the United States grants an unqualified right to the press to publish any and all matters involved in a criminal trial or whether it is necessary to balance the Sixth Amendment rights of the defendant to a trial by a fair and impartial jury against the rights of the press under the First Amendment by allowing courts to enter restrictive orders as to what may be printed by way of pretrial publicity.

2. Whether a trial court, when confronted with evidence of press coverage and based upon a knowledge of the community in which a trial is to be had and the amount of publicity being generated in the community concerning such a case, may constitutionally place restriction upon the dissemination of pretrial publicity.

3. Whether the order of the Nebraska Supreme Court entered on December 1, 1975, can be sustained as a matter of law and fact.

4. Whether the issues presented in the instant case are moot.

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

The Sixth Amendment of the Constitution of the United States provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides in part as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### STATEMENT OF THE CASE

The respondent agrees generally with the Statement of the Case as set forth in petitioners' brief at pages 4 through 23. However, respondent does not agree with the statements as set forth on page 21 of the petitioners' brief that the question involved before this Court has not been motted by the expiration of the Nebraska Supreme Court's order and, further, disagrees with and does not accept as accurate the affidavit made at Joint Appendix, pp. 14-16, ¶8, of the Statement of the Case of petitioners herein—the affidavit of Kiley Armstrong.

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### SUMMARY OF ARGUMENT

Initially, we establish the parameters of both the First and Sixth Amendments and demonstrate that neither holds a constitutionally preferred position. This co-equal constitutional status has acted as a catalyst whenever the First Amendment freedom of the press impinges upon an accused's fair trial right. Case law amply demonstrates that Sixth Amendment rights can be, and have been, effectively denied the criminally accused because of the free reign of the newspaper and broadcast media. In an effort to even the balance in favor of the accused, this Court has suggested various procedural adjustments, including prior restraints, in order to insure a fair trial before an impartial tribunal.

In light of the fact that prior restraints on dissemination of information have been allowed in various situations where interests other than First Amendment freedoms are also at stake, it is our contention that such

restraints are clearly warranted where required to preserve the fair trial right of an accused whose very life may hang in the balance. This is especially true when the publicity which is restrained is not of such a nature that a temporary delay in its widespread circulation could have any detrimental effects on society.

Finally, we point out that the evidence presented at the hearing convened by Judge Stuart demonstrated a clear threat to the impartiality of any potential jury panel. Faced with a situation in which all of the alternatives suggested in *Sheppard* would prove inadequate to alleviate this threat, Judge Stuart found it necessary to employ the only other method suggested by this Court for the purpose of providing the defendant with a fair trial, that of prohibiting newsmen from reporting information which tended to link the accused with the crime. In these circumstances, the Nebraska Supreme Court was clearly correct in holding that the order of a temporary delay in the reporting of certain facets of the upcoming case was within the court's power and was justified.

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### ARGUMENT

#### I.

**In extraordinary circumstances Sixth Amendment rights may be effectively denied the criminal defendant because of extensive pretrial publicity.**

There can be no understating the importance and desirability of a free press in our modern democracy. Free

press has served as the people's sentinel, maintaining surveillance over the entire spectrum of governmental activity. It is this continuous scrutiny of government by the press which insures that such powers are not abused.

This Court, however, has never succumbed to the mistaken belief that First Amendment freedoms are absolute and unlimited. *Poulos v. New Hampshire*, 345 U. S. 395 (1953). For a simple perusal of the relevant cases indicates that those "essential rights contained in the First Amendment in some instances are subject to the elemental need for order without which the remaining constitutional guarantees of civil . . . [liberty] would be a mockery." *United Public Workers v. Mitchell*, 330 U. S. 75, 95 (1947).

It is important to remember that whenever particular constitutionally protected conduct is limited in some degree, because of inconsistencies with other protected freedoms, the courts have a duty to determine which of the conflicting interests demands the greatest protection under the circumstances presented. *American Communications Ass'n. v. Douds*, 339 U. S. 382 (1950).

Thus, it appears from even slight investigation that the "preferred" position of the First Amendment is not nearly as firmly entrenched in our constitutional system as petitioners propose. What the relevant case law does indicate, and quite dramatically, is that whenever a legitimate conflict does exist between the right to a free press and the right to a fair trial, the balance is swung in favor of fair trial rights. More specifically, it is a fundamental tenet of our constitutional system that persons accused of crime possess the right to a fair trial under the Sixth

and Fourteenth Amendments to the Constitution. Such right has been referred to as "the most fundamental of all freedoms." *Estes v. Texas*, 381 U. S. 532, 540 (1965). Indeed, a conviction cannot stand if it results from the state's failure to provide a trial free from prejudice. *Rideau v. Louisiana*, 373 U. S. 723, 726-27 (1963).

" . . . [I]t is the same right of a fair trial, to one accused of crime, that guarantees all other freedoms, including freedom of speech and of the press. For without the right to a fair trial those freedoms would lack any means of vindication in the face of governmental oppression." See, *Allegrezza v. Superior Court*, 47 Cal. App. 3rd 948, 952, 121 Cal. Rptr. 245, 247 (1975).

To insure the fair trial required by the Sixth and Fourteenth Amendments, the defendant has been vested with a plethora of individual rights. Among these rights are trial by jury, judge's ability to set aside verdicts contrary to law and facts, requirement that the trial be conducted under strict court procedures and following time-tested rules of evidence and the requirement that criminal proceedings be tried before a fair and impartial jury. At the present time, however, there is increasing concern that the effectiveness of such basic and fundamental protections as these may be effectively overcome by the variable of pretrial publicity.

This is not to say that the right to freedom of the press is not also a protected freedom under the Constitution. This Court has recognized in *Gorsjean v. American Press Co.*, 297 U. S. 233 (1936), that the fundamental rights which are safeguarded by the first eight amendments to the Constitution enjoy an equality of protec-



tion from governmental interference. Various reported decisions have held that the right to freedom of the press exists co-equally with other constitutional rights and must be afforded the same constitutional protections from undue interference by the government. The same is not true, however, in cases in which the First Amendment freedom of press and the Sixth Amendment right to a fair trial inexorably conflict.

This Court in *Kovacs v. Cooper*, 336 U. S. 77 (1949), upheld a city ordinance banning the use of sound trucks in residential areas. In response to the argument that such an ordinance violated the First Amendment freedom of speech, the Court said:

"... The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself." 336 U. S. at 88.

Likewise, in the case of *NLRB v. Federbush Co.*, 121 F. 2d 954 (2nd Cir. 1941), Judge Learned Hand said:

"... The privilege of 'free speech,' like other privileges, is not absolute; it has its seasons; a democratic society has an acute interest in its protection and cannot live without it; but it is an interest measured by its purpose." 121 F. 2d at 957.

Therefore, it is an established principle that the freedoms guaranteed by the First Amendment are not absolutes, and may be altered or restricted when the exercise of competing privileges requires such action. Our analysis then must lead to the next logical question: Can the

constitutional requirements of insuring Sixth Amendment freedoms present sufficient competing exigencies so as to require a limitation being placed on the co-equal rights provided by the First Amendment? It is respondent's position that relevant case law mandates such action.

One of the first cases to recognize that the Sixth Amendment right to a fair trial could be effectively eliminated by the free reign of competing First Amendment provisions was *Irvin v. Dowd*, 366 U. S. 717 (1961). Factually, *Dowd* was not strikingly dissimilar to the instant case. The defendant was charged with the commission of six murders. Because of massive pretrial publicity, the defendant was granted a change of venue to adjoining Gibson County, a primarily rural county with some 30,000 inhabitants. The Court there vacated the conviction of murder and resultant death sentence, after a determination that a flood of pretrial information and comment by newspapers, radio, and television deprived the defendant of a fair trial before an impartial jury. It is noteworthy that the sentence was vacated by the Court, despite the fact that the jurors agreed to be fair and impartial. In his concurring opinion, Mr. Justice Frankfurter captioned the proceedings as "... [a] miscarriage of justice due to anticipatory trial by newspapers instead of trial in court before a jury." In commenting on the inability of a fair trial to be had in light of the unbridled freedom of the press displayed in the case, he stated:

"... [S]uch extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury. . . ." 366 U. S. at 730.

The case of *Estes v. Texas*, 381 U. S. 532 (1965), dramatically demonstrates this constitutional conflict. In *Estes*, claims of jury prejudice arose from massive pretrial publicity totalling eleven volumes of press clippings, in addition to televised courtroom activities. After a review of the results of the publicity surrounding the trial, the Court agreed that the publicity, including trial broadcasts, ". . . inherently prevented a sober search for the truth." 381 U. S. at 551, and thus denied defendant his constitutional guarantee to a fair and impartial trial. The Court also noted that the two-day pretrial hearing was also the target of a great degree of publicity, and remarked that, ". . . Pretrial can create a major problem for the defendant in a criminal case." "Indeed it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence." 381 U. S. at 536.

This language is extremely noteworthy in that it isolates the crucial issue in the free press-fair trial dilemma. It establishes as a matter of law that the most crucial time for the defendant is the pretrial period. It has also been scientifically established that earlier information is more influential than later information, and that first impressions and opinions are very difficult to shift. C. HOVLAND, ORDER OF PERSUASION 60 (1957); HOVLAND, JAMES & KELLEY, COMMUNICATIONS AND PERSUASION II (1953). Moreover, several empirical studies have pointed out that prejudice often does result from press publicity. See, e. g., Padawer-Singer & Barton, *Free Press-Fair Trial*, in THE JURY SYSTEM: A CRITICAL ANALYSIS (1975); Jaffe, *The Press and the Oppressed—A Study of Prejudicial News Reporting*

*in Criminal Cases*, 56 J. CRIM. L. C. & P. S. 1 (1965). In an experiment conducted by Mary Dee Tans and Steven H. Chaffee, the results demonstrated that potential jurors do prejudge guilt on the basis of news stories. Tans & Chaffee, *Pretrial Publicity and Juror Prejudice*, 43 JOURNALIST QUARTERLY 647 (1966). Furthermore, the experiment indicated that the more information provided, the more willing potential jurors are to make such a prejudgment. Also, the authors found that "the most damaging single element in the stories was the police report that the suspect had confessed. This is also the condition under which the incidence of judgment is highest." *Id.* at 652. Thus, it is clear that pretrial publicity does pose a threat of jury prejudice.

While we believe that the procedures established in *Sheppard v. Maxwell*, 384 U. S. 333 (1966), may effectively assure both the rights of the press and the accused to operate without infringement upon one another during the trial, we cannot agree that such procedures may effectively maintain the impartiality of the proceedings before the jury is selected. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U. S. 133, 136 (1955). Primary importance, of course, is the question of guilt or innocence, and thus the fairness of the jury ultimately selected to make such determination is crucial, since, ". . . only the jury can strip a man of his liberty or his life." *Irvin v. Dowd*, 366 U. S. 717, 722 (1961); *Groppi v. Wisconsin*, 400 U. S. 505, 509 (1971). Assuming the integrity of the jury to be the paramount concern, judicial procedures must effectively insure the integrity of this body. This imperative of jury

integrity presents no real problem once the jury has been selected, for at that point the prejudicial aspects of media coverage can be effectively removed by the simple process enunciated in *Sheppard, supra*, (i. e. sequestration and jury admonition).

A completely different situation arises, however, when a jury has not been called, and prospective jury veniremen are under no compulsion to avoid massive doses of pretrial publicity. There is no effective judicial sanction which may be imposed on these prospective jury members which will, in effect, insure their impartiality. The spectrum of the problem mushrooms when the heinousness or notoriety of the crime is great, and the prospective pool of jurors limited. See, *Maine v. Superior Court*, 66 Cal. Rptr. 724, 438 P. 2d 372 (1968). The problem seems to leapfrog. The more bizarre or notorious the crime or criminal, the greater the degree of pretrial publicity, and the more likely the possibility of improper jury influence.

This Court recognized this problem in *Estes, supra*, and commented that although the media served an important function in its continuous monitoring of governmental actions, "... its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process." *Estes v. Texas*, 381 U. S. 532, 539 (1965). Unfortunately, the Court did not elaborate on just how such "absolute fairness" could be maintained in such situations.

Perhaps the most important decision handed down by this Court in the area of free press and fair trial, was that of *Sheppard v. Maxwell*, 384 U. S. 333 (1966). This

seminal case involved the murder trial of Dr. Sam Sheppard, and the bizarre events surrounding the case, especially the deluge of almost relentless press coverage, which prompted the Court to refer to the proceedings as a "Roman Holiday." 384 U. S. at 356. The Court was quick to note the basic conflict between First and Sixth Amendment provisions, and to place these freedoms in perspective. Noting the historically important role that the press has played in providing public scrutiny of judicial proceedings, the court found that where there is, "... no threat or menace to the integrity of the trial, ... we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism." *Sheppard v. Maxwell*, 384 U. S. 333, 350 (1966).

The Court then addressed itself to the issue of pretrial and trial publicity seriously affecting the fairness of the proceedings, and concluded that such publicity may be so extensive and persuasive as to deny a defendant's right to a fair and impartial jury. The Court stated:

"... [C]ourts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Corroboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." 384 U. S. at 363.

The Court there further stated that the trial courts might find it necessary, in extraordinary circumstances to proscribe extrajudicial statements in an effort to insure the impartiality of the triers of fact, the jury.



Also of importance was the burden placed on the trial court to guard against the possible prejudicial effects of such media coverage. In finding that the, "... state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community. . . ." 384 U. S. at 363, the opinion placed on the trial court the affirmative duty to "adopt strong measures to insure that the balance is never weighed against the accused." 384 U. S. at 362.

"If publicity during the proceeding threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." 384 U. S. at 363.

Even more recently, this Court addressed the situation in *Branzburg v. Hayes*, 408 U. S. 665 (1972). Although not directly involving the central issue of the prejudicial effect of pretrial publicity, the case did deal with a conflict between the competing values of free press and the effective administration of justice. In deciding whether media reporters could be required to divulge their sources of information in the interest of the efficient functioning of the judicial process, the court effectively faced the same free press-fair trial dilemma proposed by *Sheppard v. Maxwell*, *supra*. In arguing that under certain circumstances sources of information must be divulged by reporters, the Court was forced to qualify the free press rights advanced by the media. In establishing "[t]he prevailing rule . . . that the press is not free to publish with impunity everything and anything it desires," 408 U. S. at 683, this court stated flatly:

"... [T]hey [newsmen] may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." 408 U. S. at 685.

Thus the cases indicate that the trial court is under an affirmative duty to protect the interests of the defendant in a criminal trial, and this duty may be accomplished by court imposed sanctions, including the restriction of media coverage when such circumstances demand its use. Therefore, grounded on both principle and precedent, Judge Stewart had both the authority and the duty to issue the protective order in the instant case.

Whenever pretrial, or even trial publicity is found to have so prejudiced a jury or community so as to make fair trial an impossibility, courts have attempted to offset the effect of the publicity by various procedural adjustments. These adjustments have generally been employed after the publication or broadcast has occurred and thus have been geared to allow the press to be free from prior restraint.

"These adjustments have included (1) the change of venue to remove the trial to an area not effected by the publicity; (2) the examination of prospective jurors on the *voir dire*, with the view of eliminating those who may have been influenced; (3) the isolation of juries in protracted cases; (4) the postponement of trial for substantial periods to allow the effect of prejudicial publicity to wear off; and (5) the reversal of convictions where this is necessary to assure justice." See, Lewis F. Powell, Jr., *The Right to a Fair Trial*, 51 A. B. A. J. 534 (June 1965).

In the same light, this court in *Sheppard v. Maxwell*, 384 U. S. 333 (1966), stated:

"... But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. . . . If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences . . ." 384 U. S. at 363.

#### (1) Change of Venue.

We agree that the procedures which have been developed from the relevant case law are generally adequate to insure the defendant a fair trial by an impartial jury but it should be noted that these procedures cannot insure such an outcome in every situation. Thus while we agree that the *Sheppard* procedures should be implemented whenever possible to insure the accuseds' rights we cannot agree that these measures are the sole curatives available, or that their use be attempted before other measures can be taken. *Sheppard*, for example, recommends the changing of trial venue in certain circumstances. It should be noted, however, that the particular circumstances of this case preclude the effective use of that procedure.

Neb. Rev. Stat. § 29-1301 (1975 Supp.), provides:

"All criminal cases shall be tried in the county where the offense was committed, except as otherwise provided in sections 29-1301.01 to 29-1301.03 or section 24-903, or unless it shall appear to the court by affidavits that a fair and impartial trial cannot

be had therein. In such a case the court may direct the person accused to be tried in some adjoining county."

Thus Nebraska by statutory grant allows change of venue only to adjoining counties. The appropriateness of this statute is not specifically at issue in this case, but the particular results which its use fosters are of significant impact when viewed in light of the unique circumstances involved. The multiple murders allegedly perpetrated by Erwin Charles Simants were the source of concern and dismay for a great number of local inhabitants, and news reports of the crime attracted not only local coverage, but also regional and national attention, such attention obviously known by the area's inhabitants who viewed, read and heard such statewide, regional and national reports. These facts take on even greater significance when viewed in light of the population figures for the adjoining counties to which a change of venue could be effected.

Those counties to which a change of venue could be effected include:

| <u>County</u> | <u>1970 Population</u> |
|---------------|------------------------|
| Keith         | 8,487                  |
| Perkins       | 3,423                  |
| Hayes         | 1,530                  |
| Frontier      | 3,982                  |
| Dawson        | 19,537                 |
| Custer        | 14,092                 |
| Logan         | 991                    |
| McPherson     | 623                    |

Thus, the situation here is not unlike *Irvin v. Dowd*, 366 U. S. 717 (1961), where massive localized publicity

flooded even adjoining counties, thus making the impaneling of an impartial jury impossible. See also, *Moore v. Dempsey*, 261 U. S. 86 (1923).

In the same light, it cannot be said that trial court must always agree to a change of venue before protective orders can be constitutionally applied. The ABA standards allow the trial judge to base his decision on the change of venue issue on his own determination of the type, frequency and timing of the prejudicial reports. ABA Standards, *Fair Trial and Free Press*, § 3.2 (c), at 119 (approved draft (1968)). "In addition, firm precedent demands that the court take into account whether the publicity is sufficiently localized that potential jurors in another area would be free of any taint from exposure to the press, enabling the change to serve its purpose." *United States v. Chapin*, 515 F. 2d 1274, 1288 (D. C. Cir. 1975).

The above factors, when viewed in light of the fact that all adjoining counties are served by the same local, regional and national news media as Lincoln, County, can lead to no other conclusion than that a change of venue under such circumstances will be virtually ineffectual as a curative for massive pretrial publicity, especially that of local origin, which was by far the most acute.

## (2) Continuances.

In addition to the granting of a change of venue, *Sheppard, supra*, also provides for the granting of continuances for those cases in which the pretrial publicity

presents a real and serious threat to the integrity of the trial. The theory here involved is that the passage of time may help to dilute the deleterious effect of the pretrial publicity. *Calley v. Callaway*, 519 F. 2d 184 (5th Cir. 1975). While the use of the continuance may, in some cases, achieve the desired result of providing a jury free from publicity prejudice, it should be noted that such continuances may prove detrimental, if not violative, of the accused's constitutionally protected right to a speedy trial. It is also questionable as to whether the continuance serves its purpose in cases such as this one, where the entire population of a small community is acutely aware of the relevant facts and the position of the accused in relation to those facts. Such were the circumstances in *Maine v. Superior Court*, 66 Cal. Rptr. 724, 438 P. 2d 372 (1968), where no fair trial could be had because of a prevailing community hostility toward the defendant, caused in part by the extensive publicity which blanketed the small community. Noting the nature of the charges (i.e. kidnapping, forceable rape and assault with intent to commit murder), and the deep emotional feelings of the community residents, the court refused to grant a continuance of the case, stating:

"... While a lengthy continuance might sufficiently protect the accused in some cases, it does not do so here. Delays may be an efficacious antidote to publicity in medium and large cities, but in small communities, where a major crime becomes embedded in the public consciousness, their effectiveness is greatly diminished. . . ." 66 Cal. Rptr. at 732, 438 P. 2d at 380.

The American Bar Association has likewise taken the position that while the use of continuances could possibly



assure a fair trial in light of prejudicial news disclosures, the continuance could also effectively deny other rights of the defendant and the sovereign's right to preserve the orderly administration of justice.

"... A continuance, if it is to be long enough to dissipate the effects of the potentially prejudicial publicity, may require the defendant to sacrifice his right to a speedy trial and its purpose will be defeated if the publicity is renewed when the case finally comes up." See, Reardon, Report of the American Bar Association, *Standards Relating to Fair Trial and Free Press*, at 75 (1966) (the ABA Legal Advisory Committee on Fair Trial and Free Press).

The conclusion of that report was that the use of the continuance as a tool in highly publicized trials offered only "limited utility," to the trial court, and was in need of supplementation by other means.

In *Groppi v. Wisconsin*, 400 U. S. 505 (1971), the court addressed the question of the desirability of the use of continuances in cases involving massive pretrial and trial publicity. The Court there stated:

"One way to try to meet the problem is to grant a continuance of the trial in hope that in the course of time the fires of prejudice will cool. But this hope may not be realized, and continuances, particularly if they are repeated, work against the important values implicit in the constitutional guarantee of a speedy trial. . . ." 400 U. S. at 510.

The right to a speedy trial, recognized as a constitutional requisite in *Klopfer v. North Carolina*, 386 U. S. 213 (1966), has been found essential "[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public ac-

cusation, and [3] to limit the possibilities that long delay will impair the ability of the accused to defend himself." *United States v. Ewell*, 383 U. S. 116, 120 (1966). Since the imposition of any continuance raises the possibility that such evils may occur, and based on the fact that no trial judge can effectively determine the amount of time necessary to eliminate jury prejudice, nor assure himself or the defendant that future publicity might not again force a continuance, it seems only logical that continuances are not the preferred solution.

In addition to the principles set out above, Judge Stuart was also constrained by statutory enactment, specifically Neb. Rev. Stat. §§ 29-1205 et seq. (1974 Supp.), which provide that criminal trials must occur within six months of the date the accused is charged. As for continuances, the statute provides:

"... in criminal cases in the district court the court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defense, but also the public interest in prompt disposition of the case." Neb. Rev. Stat., § 29-1206 (1974 Supp.).

The statutes further provide that failure to bring the defendant to trial within six months shall result in the defendant's "absolute discharge from the offense charged." Neb. Rev. Stat. § 29-1208 (1974 Supp.).

When viewed in light of constitutional and statutory requirements and the disfavor with which the continuance is viewed in current decisional law, it is evident that Judge Stuart had no alternative but to discount the use of a continuance as a viable alternative to the facts presented in this case.

### (3) Voir Dire Examination.

In addition to the granting of continuances and changes of venue, courts have generally relied on the use of the voir dire examination to eliminate unfavorable jurors who have been influenced by publicity and other variables occurring prior to trial. Unfortunately, this procedure does not always prove "adequate to effectuate the constitutional guarantee." *Groppi v. Wisconsin*, 400 U. S. 505, 510 (1971).

This court has, on several occasions, held that a juror's voir dire assurance may be unreliable if "deep and bitter prejudice" against a defendant is found, see, e.g., *Irvin v. Dowd*, 366 U. S. at 727-728, or where massive prejudicial publicity has saturated a community prior to the trial, see, *Sheppard v. Maxwell*, 384 U. S. at 353-356.

In *Irvin, supra*, the court reversed the defendant's conviction on grounds of pretrial publicity prejudice, despite the fact that the jurors had, on voir dire, denied any prejudice and agreed to act impartially. The Court commented in that case:

"... No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. . . ." 366 U. S. at 728.

At this point it is important to recall the nature of the case from which this action sprang. Erwin Charles Simants had been charged on six separate counts of murder while perpetrating or attempting to perpetrate one or more sexual assaults. These offenses were crimes of violence and passion. It is important to note that the decisions in *Irvin, supra*, and *Sheppard, supra*, involved

cases in which defendants were charged with violent and gruesome first degree murders, crimes with marked propensity to arouse and inflame passions, create widespread shock and fear in the community, and encourage public outcries for retribution against the defendant. Obviously, such factors could influence juror's decisions, although such jurors might be highly reluctant to admit such on the voir dire. "The totality of the circumstances controls whether the likelihood of prejudice is too great to permit the jurors' avowals of impartiality to be accepted." *United States v. Liddy*, 166 U. S. App. D. C. 102, 509 F. 2d 428, 435 (D. C. Cir. 1974). As Judge Aldisert states in his dissenting opinion in *United States v. Schiavo*, 504 F. 2d 1 (3rd Cir. 1974):

"... As a prophylactic measure, voir dire inquiry is to be encouraged; as a guaranteed method of insuring the trial's integrity, it leaves much to be desired." 504 F. 2d at 24.

Although courts have often referred to the benefits and detriments of the voir dire examination, little empirical research has ever been done concerning its overall effectiveness as a selection tool. One such study, however, has concluded that the value of the voir dire examination is marginal at best. Broader, "*Voir Dire Examinations: An Empirical Study*," 38 So. Cal. L. Rev. 503 (1965). As for the nature and effectiveness of the voir dire examination, the study concluded that "voir dire is grossly ineffective [as a screening mechanism] . . . jurors often, either consciously or unconsciously, lie on voir dire." *Id.* at 528.

Petitioners, in their brief, contend that voir dire presents an effective method of screening jurors in cases in-

volving pretrial publicity. The court must, however, be mindful of two important factors. First, the voir dire examination is by its nature an investigative and not a curative tool. Its ability lies not in preventing the disastrous effect of the pretrial publicity, but simply in avoiding the "Roman Holiday" and hollow formality which could result from holding the trial in such circumstances. If prejudice is discovered by the "post-publication" voir dire, the most that can be accomplished is the declaration of a mistrial, and this declaration can only be achieved by the sacrifice of the accused's right to a fair and speedy trial, and the frustration of society's desire for the swift and effective administration of justice.

Secondly, the cases and empirical conclusions set out in this brief illustrate the concern of courts and social scientists alike that voir dire may not provide an adequate mechanism to insure trial reliability. "The law must be sympathetic to this viewpoint, and must make the sympathy meaningful in a practical world of public trials." *State v. Van Dwyne*, 43 N. J. 369, 386, 204 A. 2d 841, 850 (1964). The trial court can no longer rely on voir dire, but must determine for itself whether pretrial publicity may become so pervasive and so prejudicial that a fair trial cannot be had.

#### (4) Reversal of Convictions.

It is obvious that the use of reversals to overturn convictions based on improper and prejudicial publicity is no cure to the problem, but simply a final assurance of fairness to the individual accused. Although necessary to protect the right of a defendant to a fair trial, the reversal should not even be considered as an alternative,

but instead as an expedient. "Such reversals cast a heavy burden, financial and otherwise, on the public and the defendant." *State v. Van Dwyne, supra*, 43 N. J. at 387, 204 A. 2d at 851. While a reversal may prove necessary or advantageous in preventing a classic miscarriage of justice, its use, "... may involve the expense and inconvenience of a second trial, and if a second trial cannot be had, may result in the freeing of a guilty man, who but for the unfairness of his initial trial, would have been punished for his crime." Reardon, Report of the American Bar Association, *supra*, at 75.

#### (5) Sequestration of the Jury.

The use of the court's power of sequestration of the jury, as announced in *Sheppard v. Maxwell, supra*, is an important and essential tool to be applied in any case involving the threat of prejudicial publicity. Effective use of this power can help to insure the integrity of those ultimately chosen as jurors, and serves the concurrent function of reducing the limits of any restrictive order to the absolute minimum time necessary to insure the fairness of the overall process. Although sequestration places a more substantial burden on the individuals selected as jurors, as well as a greater financial burden on the state, its use is of unquestionable value in cases of this nature.

One of the primary dangers with pretrial publicity is its unchecked impact on potential jurors. Before the jury is actually selected, the entire adult community represents a potential jury. Each individual may possibly be called to serve on the jury panel. Obviously, these community members are under no compulsion or admonition to avoid the pretrial publicity filtering through the



community. This is especially true in extraordinary or bizarre cases which are covered more extensively by the press and generally are more exciting, intriguing, or newsworthy than other criminal cases. Thus, the only effective method of insuring the jury's impartiality, when the curatives of *Sheppard* are not viable, is to limit the scope of the pretrial publicity. To this end the Supreme Court of Nebraska in this case fully protected the Sixth Amendment rights of Erwin Charles Simants without imposing unreasonable restraints on the petitioners. Freedom of the press is not absolute.

## II.

**Temporary restraints on First Amendment freedoms are permitted in extraordinary circumstances where no other means exist by which to protect other fundamental interests upon which the functioning of our society depends.**

As has been established, the freedoms protected by the First Amendment cannot be regarded as absolute privileges to be invoked without consideration of other constitutionally guaranteed rights. This fact is reflected in Justice Blackmun's dissenting opinion in *New York Times Co. v. United States*, 403 U. S. 713 (1971):

"The First Amendment, after all, is only one part of an entire Constitution. . . . Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. . . ." 403 U. S. at 761.

While the First Amendment protects against both prior restraint and subsequent punishment, prior restraint has been more sharply disfavored because of the danger of governmental censorship inherent in such a context. Yet it is clear, and this Court has held, that prior restraints must be permitted in some situations where interests other than free speech are also at stake.

In *Near v. Minnesota*, 283 U. S. 697 (1931), this Court for the first time explicitly recognized that exceptions existed to the general rule of no prior restraint:

"The objection has also been made that the principle as to immunity from previous restraint is stated too broadly if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. . . ." 283 U. S. at 715-716.

Of course, as was made clear by Justice Butler in his dissenting opinion, the Minnesota statute which was at issue in *Near* did not operate as a prior restraint in the historical sense of the phrase, since it did not authorize administrative control in advance as had been formerly exercised by the licensors and censors of which Blackstone spoke. Ever since the decision in *Near*, however, the type of limitation on reporting in which the publisher is informed that if he circulates certain matter he will be subject to punishment has been commonly referred to as a prior restraint. Therefore, respondent acknowledges that the court order which is now at issue is a prior restraint under today's terminology, while reminding the Court that this is something quite different from the governmental censorship which was known as a prior restraint at the time of the adoption of the Bill of Rights.

In the majority opinion in *Near*, Chief Justice Hughes indicated that prior restraints, as he now defined the term, would not be prohibited in "exceptional cases," and as illustrative of such cases he mentioned three situations. The first illustration referred to restraints which would be permissible when the nation was at war, the second related to obscenity, and the third involved sedition. It is clear, however, that the exceptions to the rule of no prior restraints were not limited to only these three illustrations, and that the definition of "exceptional cases" can include other diverse situations. Chief Justice Burger, dissenting in *New York Times Co. v. United States*, *supra*, emphasized this fact:

"... Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout 'fire' in a crowded theater if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near v. Minnesota*. There are no doubt other exceptions no one has had occasion to describe or discuss. . . ." 403 U.S. at 749.

As new situations have arisen, this court has repeatedly confirmed the fact that exceptions to the rule against prior restraint do exist. In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), this Court approved a statutory scheme that permitted suppression of allegedly obscene matter for two days pending a judicial determination as to whether or not the material was, in fact, obscene. In *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968), this Court recognized that an injunction forbidding the staging of a political rally may be permissible, as long as notice is first given to those

who would be subject to the injunction, and a hearing is held. Furthermore, federal circuit courts have held that court orders which place limits on the dissemination of information related to judicial proceedings can be permissible if some type of notice and hearing precede the order. *United States v. Schiavo*, 504 F.2d 1 (3rd Cir. 1974); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972). It can thus be clearly seen that prior restraints on dissemination of information are generally regarded as appropriate in special circumstances, although a due process requirement of notice and a hearing must first be fulfilled. In relation to this last point, it must be pointed out that Judge Stuart, prior to issuing the order now challenged, did give notice to each party and did conduct a hearing at which representatives of the media were present and were allowed to call and question witnesses, to cross-examine the defendant's witnesses, and to present argument.

Decisions of this Court have acknowledged that there is a heavy presumption against the constitutional validity of any prior restraint on expression. *New York Times Co. v. United States*, *supra*; *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). It is obvious that if there is only a presumption of unconstitutionality, there must be some circumstances in which prior restraints are constitutional. What is thus required is an examination of the specific circumstances of each case in order to determine whether the particular restraint on the dissemination of information was justified. As Justice Frankfurter asserted in *Kingsley Books, Inc. v. Brown*, *supra*:



"... The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul Freund, 'is a pragmatic assessment of its operation in the particular circumstances . . .'" 354 U. S. at 441-442.

In assessing the particular aspects of this case, it must continually be remembered that freedom of the press is only one of several rights protected in the Bill of Rights. The Sixth Amendment, as well as the First Amendment, involves rights which must be regarded as fundamental. Justice Jackson, dissenting in *Craig v. Harney*, 331 U. S. 367 (1947), perhaps stated it best:

"The right of the people to have a free press is a vital one, but so is the right to have a calm and fair trial free from outside pressures and influences. Every other right, including the right of a free press itself, may depend on the ability to get a judicial hearing as dispassionate and impartial as the weakness inherent in men will permit. . . ." 331 U. S. at 394-95.

Justice Frankfurter has pointed out that the First Amendment was never intended to be placed in a preferred position in relation to the right of an accused to a fair trial. In a concurring opinion in *Pennekamp v. Florida*, 328 U. S. 331 (1946), he stated:

"... [T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. '... the liberty of the press is no greater and no less than the liberty of every

subject of the Queen,' Reg. [ina] v. Gray [1900] 2 QB (Eng) 36, 40,—Div. Ct., and, in the United States, it is no greater than the liberty of every citizen of the Republic. The right to undermine proceedings in court is not a special prerogative of the press." 328 U. S. at 364.

In *Maryland v. Baltimore Radio Show, Inc.*, 338 U. S. 912 (1950), in a separate opinion concerning the denial of a petition for certiorari, Justice Frankfurter further developed this concept:

"... One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right. On the other hand our society has set apart court and jury as the tribunal for determining guilt or innocence on the basis of evidence adduced in court, so far as it is humanly possible. It would be the grossest perversion of all that Mr. Justice Holmes represents to suggest that it is also true of the thought behind a criminal charge '... that the best test of truth is the power of the thought to get itself accepted in the competition of the market.' *Abrams v. United States*, 250 U. S. 616, 630, . . . Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with any other means for establishing the charge." 338 U. S. at 920.

In light of the fact that prior restraints are permissible in exceptional cases, together with the fundamental nature of the right of an accused to a fair trial before an impartial jury, it is clear that the constitutional validity of Judge Stuart's order, as modified by the Nebraska Supreme Court, must be upheld. The order related only to pre-trial publicity, which was defined as reporting prior to the empaneling of the jury. Thus, all restrictions



would dissolve as soon as the court, by way of sequestration, would be in a position to insure the impartiality of the jury.

This fact, that the restraint on publication continues only until the empaneling of the jury, separates this case from those where restrictions on the media continue during the course of, or even after, the trial proceedings themselves. In *Times-Picayne Publishing Corp. v. Schulinkamp*, 419 U. S. 1301 (1974), Justice Powell, hearing the case as Circuit Justice, granted a stay of a Louisiana trial court's order which placed restrictions on the media coverage of two defendants accused of committing a highly publicized rape and murder. The order in that case, however, included restrictions on what could be published not only before the trial, but also during the trial. Furthermore, after the two defendants' cases were severed and separate trials were ordered, the court failed to modify the order, so it would have remained in effect until the termination of the last trial. Thus, the stay was granted because the trial court's order went further than was necessary to protect the rights of the defendants. Mr. Justice Powell said:

"The state court was properly concerned that the type of news coverage described above might be resumed and might threaten the defendants' rights to a fair trial. But the restraints it has imposed are both pervasive and of uncertain duration. They include limitations on the timing as well as the content of media publication, cf. *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974)." 419 U. S. at 1308.

In a footnote, Mr. Justice Powell added that "respondent has indicated his intention to sequester juries. This will protect many of the hazards that the selective restrictions

on reporting during trial are designed to prevent." *Id.* at 1308, n. 3. It is apparent from these statements that much of the difficulty with the trial court's order was the fact that it would continue in effect longer than necessary to insure the impartiality of the jury. The order which petitioners here appeal, on the other hand, was designed to restrain publication only until the trial was commenced, at which time the jury could be sequestered and the defendant's Sixth Amendment rights could thus be adequately protected. In this way, the order struck the proper balance between the conflicting fundamental rights involved, so that each was protected to the greatest extent possible while acknowledging the existence of the other.

The petitioners' argument that there can be no restraints on the reporting of proceedings occurring in courtrooms which are open to the public, or on the reporting of information contained in public court files, because the press is merely giving publicity to information that is already public begs the question. It is not the fact that the information is available to the public which threatens the fairness of the trial, rather it is the fact that the news media can disseminate the information in such a manner that its impact will tend to create a community-wide belief in the guilt of the accused. In this way, pretrial publicity can threaten the very basis upon which our criminal justice system rests, the presumption that every defendant is innocent until proven guilty in a court of law. It is therefore not surprising that other courts have also restrained the press from reporting portions of the public record of a preliminary hearing. *State v. Meek*, 9 Ariz. App. 149, 450 P. 2d 115 (1969), cert. den., 396 U. S. 847 (1969); *Asbill v. Fisher*, 84 Nev. 414, 442 P. 2d 916 (1968),

See also, *People v. Elliott*, 6 Cal. Rptr. 753, 354 P. 2d 225 (1960).

Furthermore, the theory that a "public right to know" demands a finding that the restraints on publication here involved are unconstitutional also does not stand up under critical analysis. The fallacy of this idea has been pointed out by Mr. Justice Powell, in his capacity at that time as President of the American Bar Association:

"To fashion additional safeguards for fair trial within the framework of the Bill of Rights, we must avoid being confused by generalizations and slogans. There has been a disposition sometimes to equate the news media and the public. Again, some persons have talked about a 'public right to know' as if it were a constitutional right.

"These generalizations miss the point. The essence of the freedom guaranteed by the First Amendment is to permit the unlimited expression of views about matters of public and political concern and to respect the sanctity of individual conscience and belief. We have recognized that there are areas of privacy in which respect for the individual and his rights precludes the satisfaction of public curiosity.

"We must bear in mind that the primary purpose of a public trial and of the media's right as a part of the public to attend and report what occurs there is to protect the accused. When we speak of the constitutional right to a public trial, we do not mean a spectacle before the public at large. The guarantee of a public trial was never intended to protect any right of the public to be entertained. The purposes of this guarantee are to prevent secret trials and to assure through the safeguards of appropriate public scrutiny that the administration of justice is honest, efficient and in conformity with law. The ultimate public concern is not the satisfaction of curiosity

or an abstract 'right to know.' Rather it is the assurance that trials are in fact fair and according to law." Powell, *The Right to a Fair Trial*, 51 A. B. A. J. 534, 538 (1965) (footnotes deleted).

Of course, it may be felt that cases could exist in which the necessity of informing the public is, due to the issues involved, so vital that restraints will not be permitted even though the possibility of empaneling an impartial jury will be imperiled. In *United States v. Dickinson*, 465 F. 2d 496 (5th Cir. 1972), the Court felt that the need to keep the public informed of the facts brought out at a hearing was particularly compelling, since the issue being litigated concerned charges that elected state officials had trumped up charges against an individual solely because of his race and his involvement in civil rights activities. Quoting from *Wood v. Georgia*, 370 U. S. 395 (1962), the Court declared:

" 'Particularly in matters of local political corruption and investigation is it important that freedom of communications be kept open and that the real issues not become obscured. . . . ' " 465 F. 2d at 508.

However, under the order of Judge Stuart, as modified by the Nebraska Supreme Court, the only matters which were prohibited from being published concerned confessions or admissions against interest made by the defendant to persons other than news media representatives, and other information strongly implicative of the accused as the perpetrator of the slayings. There is clearly no compelling necessity of the public to require that such information be the subject of constant, wide-spread news coverage before the trial has even begun. Moreover, the effect such coverage would have on the ability to obtain



an impartial jury is obvious. As Mr. Justice Blackmun said in his in chambers opinion in this case, as Circuit Judge:

" . . . A prospective juror who has read or heard of the confession in statements repeatedly in the news may well be unable to form an independent judgment as to guilt or innocence from the evidence adduced at the trial." — U. S. —, 96 S. Ct. at 255.

It is therefore clear that where there is an alternative manner of proceeding which will protect the fairness of the trial while still allowing the public to be completely informed during the entire duration of the trial itself, this alternative should be adopted. This is precisely the course which Judge Stuart adopted.

It is true, of course, that where the First Amendment interests are not so compelling as to justify endangering the impartiality of the jury, prior restraints on reporting should not be upheld. There must be a clear showing that the dissemination of the information poses a threat to the fairness of the trial. Various standards have been proposed in regard to precisely how serious the threat must be before temporary restraints may constitutionally be imposed. One suggested standard has been the familiar one of clear and present danger. *Sun Co. v. Superior Court*, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (4th Dist. 1973). Another proposed test provides that there is a sufficiently serious threat if there exists a reasonable likelihood of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. *United States v. Tijerina*, 412 F. 2d 661 (10th Cir. 1969). And some courts have claimed that only those comments which pose a serious and imminent threat of

interference with the fair administration of justice may be proscribed. *Chicago Council of Lawyers v. Bauer*, 522 F. 2d 242 (7th Cir. 1975); *United States v. Dickinson*, 465 F. 2d 496 (5th Cir. 1972); *Chase v. Robson*, 435 F. 2d 1059 (7th Cir. 1970). In any event, it is clear in this case that the threat to the fairness of the trial was sufficient to meet whatever standard is adopted, and to justify the restraints imposed. In comparing various standards, this Court has said:

" . . . Whether the threat to the impartial and orderly administration of justice must be a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes." *Pennekamp v. Florida*, 328 U. S. 331, 336 (1946).

*Pennekamp* involved an appeal of a contempt conviction, but clearly the requirement of balancing the need for wide public dissemination of the information against the necessity of providing the defendant with a fair trial must also apply in determining whether or not a prior restraint may be imposed. And in weighing that balance, the result must surely come out on the side of insuring the fairness of the trial when the information involved is not related to allegations of public corruption, but rather is confined to facts concerning only the alleged admissions of a private citizen who has been accused, rightly or wrongly, of committing a crime. As was observed in *Chicago Council of Lawyers v. Bauer*, *supra*:



" . . . Only slight reflection is needed to realize that the scales of justice in the eyes of the public are weighed extraordinarily heavy against an accused after his indictment. A bare denial and a possible reminder that a charged person is presumed to be innocent until presumed guilty is often insufficient to balance the scales." 522 F. 2d at 250.

Certainly, whatever interest the public might have in seeing immediate wide-spread publicity concerning alleged confessions, that interest is not so vital as to justify tipping the scales even further against the accused in cases where the public welfare could not possibly be adversely affected by temporary delays on the generation of such publicity.

### III.

**The record shows that Judge Stuart clearly acted properly when, after holding a hearing at which the threat to the fairness of the proceedings was amply demonstrated, he chose the only course open to him by which to fulfill his affirmative duty to provide the accused with a fair trial.**

#### (1) Judges' Affirmative Duty.

It is a well established principle that trial proceedings are subject to the control of the court, upon whose final authority rests the determination of the form and manner of proceeding which the trial will take. As has been noted previously, the threat of prejudicial publicity is also a variable requiring administration by the trial court in those cases in which such publicity is, or is likely to be, a serious threat to the integrity of the proceeding.

Based on the decision in *Sheppard v. Maxwell*, 384 U. S. 333 (1966), there can be no question, but that Judge Stuart was under an affirmative duty to insure that the fairness of the proceedings were not compromised by any prejudicial news reporting. This Court, in establishing such a duty stated:

" . . . Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . ." 384 U. S. at 362.

Therefore, Judge Stuart, under the affirmative duty placed upon him by *Sheppard, supra*, was required to take steps to insure the integrity of the trial from outside influences. He did just that.

#### (2) The Threat (Pretrial Publicity).

Accepting as an established principle that trial courts have an affirmative duty to guard against the threat of prejudicial publicity, this analysis then must turn to the next logical question: Were there sufficient circumstances presented by the record in this case, to pose a threat to the integrity of the trial? As has been previously stated, it is respondent's position that the record in the case amply demonstrates the existence of such circumstances.

The record clearly demonstrates that between 20 October 1975 and 23 October 1975 (which was before Erwin Charles Simants was afforded a preliminary hearing), certain newspapers had printed articles (Exhibits 4A, 4C, and 4E of the Joint Appendix) which contained

hearsay information and purported statements of counsel, which, if true, tended clearly to connect Erwin Charles Simants with the murders and which information, if true, was likely to be, or at least some of it would be, presented at the preliminary hearing. In addition, local television and radio broadcasts and national news coverage focused the attention of the public onto the trial and the accused (see remaining exhibits). One of the articles in the North Platte Telegraph also expressed doubt that the Nebraska Bar-Press Guidelines for Disclosing and Reporting of Information Relating to Imminent or Pending Criminal Litigation would apply to a preliminary hearing. Thus, Judge Stuart could quite properly conclude that the evidence from the preliminary hearing, if it was in fact presented, would have again been repeated by at least some of the petitioners. "Those conclusions are reinforced by the fact that in open court at the hearing before the District Judge, counsel for the media stated that it is already doubtful that an unbiased jury can be found to hear the Simants case in Lincoln County." *State v. Simants*, 194 Neb. 797, 236 N. W. 2d 794 (1975). Other counsel for the media at that same hearing stated that "it (the court) would be even justified to have mistrials in order to guarantee the free press." Joint Appendix at p. 71.

The concern of the prosecutor, the defense attorney, and Judge Stuart that pretrial publicity might make it difficult or impossible for the State of Nebraska to afford Erwin Charles Simants a fair trial was not ill-founded. As has been shown, the news media have the power to inform and arouse the interests and feelings of a community so that no fair trial can be had. *Estes v. Texas*,

*supra*; *Sheppard v. Maxwell*, *supra*. Although on occasion such reporting has been of a sensational and bizarre nature, it must be noted that honest and factual reporting by sincere and responsible news services can similarly, though unintendedly, cause identical results, thus frustrating the criminal process.

As is true in the instant case, the most serious problems in this area relate to the pretrial publicity which generally accompanies bizarre and sensational crimes, and the effect such pretrial publicity has on the members of the community from which the jury venire is selected. The greater the degree of sensationalism or "newsworthiness" a particular criminal proceeding contains, the greater the pretrial publicity will be, and extensive publicity raises the possibility of greater degrees of pretrial prejudice due to the so-called "trial by publicity." This possibility of prejudice becomes even more acute when the proceedings occur in a sparsely populated area. See, *Irvin v. Dowd*, *supra*, and *Maine v. Superior Court*, *supra*.

As has been pointed out previously, the offenses charged here were violent and gruesome first degree murders and sexual assaults. These crimes have classically engendered hostility and passion in community members and have too often been the target of irresponsible news media, who "... [i]ntentionally or inadvertently ... can destroy an accused and his case in the eyes of the public." *Estes v. Texas*, 381 U. S. at 549. Based on the sparsity of population in the area, the overall tenor of the community following the incident, ample evidence exists on the record to sustain Judge Stuart's determination



that the integrity of the trial could easily be compromised by pretrial media reporting of various aspects of the case.

This is especially true when viewed in light of the evidence which would be presented at the preliminary hearing, and the possibility of the media releasing, prior to trial, evidence of respondent Simant's confession to the alleged crimes. Obviously, the preliminary hearing represented the gravamen of Judge Stuart's problem since such hearing would be the first time that any evidence was made public. There can be no understating of the impact that the gruesome and bizarre facts of the case would have on the residents of this small community. Such facts could clearly, "... set the community opinion as to guilt or innocence." *Sheppard v. Maxwell*, 384 U. S. at 362.

The above takes on added dimension when consideration is given to the fact that news reporting need not be sensational or "yellow" to result in prejudice. Even simple factual reports, while not blatantly prejudicial, sometimes tend to pervade the impartiality of the community and the prospective jurors. This is probably most evident in cases in which pretrial press reports discuss factual material which, because of strict rules of evidence, is not allowed to be offered in open court. Thus the jury becomes aware, even before trial, of certain evidence which, because of the strict rules of evidence, is not admissible at the trial. Things such as improper lineup identifications and illegally obtained confessions are examples of the many facts which can be reported on by the media, but not introduced in open court. Such

were the circumstances faced by Judge Stuart in this case, where the fact of Erwin Charles Simants' alleged confession increased the danger that pretrial publicity might result in unfair prejudice.

"When the fact that an accused confessed or the contents of his purported confession enters into the jury's deliberations, without a prior determination by the court of its voluntariness and admissibility, a conviction will be reversed regardless of how clearly it is supported by other evidence. *Jackson v. Denno*, 378 U. S. 368 (1964). This result attests to the obvious highly prejudicial nature of a confession by the accused. Since the possibility of a confession's not being admitted into evidence is distinct and the probability of prejudice is so great, it should be considered essential to the impartial administration of justice that publications disclosing the existence or contents of a purported confession at any time before its admission as evidence be prohibited." LeWine, *What Constitutes Prejudicial Publicity in Pending Cases?*, 51 A. B. A. J. 942, 946 (1965).

Therefore, based on the unique circumstances presented by the record, the nature of the crime, and the community setting surrounding the prosecution, there is no question but that unrestricted pretrial publicity presented an obvious threat to the integrity of the trial.

### (3) Inapplicability of Sheppard Alternatives.

This Court held, in *Sheppard v. Maxwell*, *supra*, that the Sixth Amendment imposes an affirmative duty on the trial court to take adequate measures to insure defendants fair trials, free of prejudice and disruption. In fulfilling their charge, trial judges have been authorized to take those steps necessary to insure that "... the balance



is never weighed against the accused." *Sheppard v. Maxwell*, 384 U. S. at 362.

As stated previously, *Sheppard*, *Branzburg*, and other decisions have proposed solutions which attempt to deal with the problems faced by trial judges in this area. Obviously, the least obtrusive remedy capable of solving the problem presents the best alternative. Surely, no trial judge would be authorized or expected to change the trial venue when a simple jury admonition would be sufficient to solve the problem. Likewise, the affirmative duty established in *Sheppard*, *supra*, prohibits the trial judge from selecting a particularly mild curative, when it is obvious that a more radical procedure is warranted.

As has been noted, current decisions have developed a number of possible solutions to the problems presented by prejudicial pretrial publicity. Basically, these procedures can be grouped into six categories. It is respondent's contention here, that five of the six recognized solutions were inapplicable in this case, when viewed in light of the various circumstances facing Judge Stuart. The only available alternative which appeared effective was the use of the protective order, which was ultimately ordered by Judge Stuart.

First, ordering a change of venue proved a poor solution, when reviewed in light of Neb. Rev. Stat. § 29-1301 (1975 Supp.), and the nature of the media coverage involved. Constrained by statute to change venue to an adjoining county, which is served by the same media services as Lincoln County, and aware of the sparsity of population in such counties, Judge Stuart was clearly

justified in declining the use of the change of venue as a solution.

Similarly, the granting of a continuance has been shown to be of marginal utility when viewed in light of the burdens which its use may impose on the defendant, as well as the state. The possibility of infringement on the accused's right to a speedy trial, as well as the statutory constraints of Neb. Rev. Stat. §§ 29-1205, et seq. (1974 Supp.), as discussed *infra*, precluded the effective use of this alternative by Judge Stuart.

Thirdly, various decisions have relied on the use of the voir dire examination to eliminate prejudiced jurors who have been adversely affected by pretrial publicity. While the voir dire has long been recognized as a useful selection tool, its use presents no benefit in those situations in which an entire community is unduly prejudiced against the accused. Our discussion, *infra*, has noted the limited effectiveness of the voir dire in cases such as *Estes v. Texas*, *supra*, *Irvin v. Dowd*, *supra*, and *Sheppard v. Maxwell*, *supra*, all gruesome murder prosecutions similar to the case faced by Judge Stuart. When viewed in light of the sparsity of population and the heinous nature of the crime, and using the media coverage between October 18 and October 23 as an indicator of the type and volume of future coverage, there can be no question but that a voir dire examination, no matter how extensive or well done, could not effectively guarantee a fair and impartial jury panel.

As for two of the other factors which recent cases have relied on as weapons to combat the effect of prejudicial publicity (i. e., sequestration of juries during trials

and reversals of convictions), respondent fully agrees with their use and effectiveness. It is obvious, however, that the use of these procedures, especially sequestration, must be augmented by other procedures designed to insure the impartiality of the jurors while they are still veniremen. Only by insuring the integrity of those individuals selected to serve as jurors will the use of sequestration prove valuable, for if the jury venire is unduly influenced prior to trial, sequestration will have no effect.

Therefore, after a determination that the above procedures could offer little insurance of impartiality, Judge Stuart was required by his affirmative duty to institute the protective order which is the focus of this proceeding.

"... When a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied. . . ." *Patterson v. Colorado*, 205 U. S. 454, 463 (1907) (Opinion by Mr. Justice Holmes.)

#### (4) The Validity of the Order.

The record shows that adequate precautions were taken to insure that the protective order was indeed necessary and that it was properly entered against petitioners. Aware that prior restraints on expression are permitted only in limited circumstances, Judge Stuart imposed the order only after a careful consideration of the circumstances demonstrated that this truly was one of those exceptional cases of which the Court spoke in *Near v. Minnesota*, *supra*. On October 23, petitioners filed an

application with the district court for leave to intervene in the criminal proceeding which was being brought against the accused. Judge Stuart, believing that the media had a right to an adjudication of their constitutional claims, allowed their intervention (Joint Appendix 33). He then notified the parties that a hearing would be held later that evening concerning the intervenor's motion to modify or dissolve the order which had been issued by the Lincoln County Court. Although notice was given less than two hours prior to the hearing, this was done at the insistence of petitioners, who desired that the hearing be conducted as soon as possible (Joint Appendix 35-36). At the hearing, counsel for petitioners, as well as the state and the defendant, were allowed to call witnesses, to cross-examine opposing parties' witnesses, and to present argument (Joint Appendix 36-77). The record at the hearing clearly demonstrated, as the Nebraska Supreme Court pointed out in the opinion below, that before the order of the county court was entered against the media, and even prior to the preliminary hearing, newspapers were printing articles which contained hearsay information and purported statements of counsel which tended to connect the accused with the slayings. *State v. Simants*, 194 Neb. 783, 796, 236 N. W. 2d 794 (1975). It was only after this hearing was concluded that Judge Stuart entered any order against petitioners.

In reviewing the action of the district court, the Nebraska Supreme Court carefully examined the record in order to be certain that all proper steps had been taken before the temporary restraints were imposed. No deficiencies were found. Clearly, as the Nebraska Court held, petitioners had submitted themselves to the juris-



diction of the district court by their motion to intervene. *State v. Simants*, 194 Neb. 783, 796, 236 N. W. 2d 794 (1975). Although the permission to intervene was granted erroneously, the petitioners undeniably had approached the district court with the view that it was the proper forum in which to resolve the question of their rights vis-a-vis the rights of the accused. The district court addressed this question, and, after a full hearing on the matter, made a determination as to the respective rights of each. Having done this, the court certainly possessed the power, as well as the duty, to enforce that determination by means of an order directed at those who had originally approached the court requesting the determination.

Respondent further points out that the Sixth Amendment duty to take measures necessary in order to insure fair trials clearly applies to judges as well as to prosecutors. *Sheppard v. Maxwell*, *supra*. In carrying out this duty, judges have the power, under *Sheppard*, to restrict conduct outside the courtroom of parties, lawyers, jurors, witnesses, court officials, and others connected with the trial process. It is this nucleus of power to assure defendants fair trials which enables courts to restrict the actions of nonparties when those actions threaten the court's ability to function properly. See, *United States v. Schiavo*, 504 F. 2d 1 (3rd Cir. 1974); *United States ex rel. Robson v. Malone*, 412 F. 2d 848 (7th Cir. 1969); and *United States v. Venuto*, 182 F. 2d 519 (3rd Cir. 1950). And, it is this same nucleus of power which provided the basis for the declaration by the plurality opinion in *Branzburg v. Hayes*, 408 U. S. 665 (1972), that "[n]ews-men . . . may be prohibited from attending or publishing

information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." 408 U. S. at 684-85.

Clearly, Judge Stuart was acting within the bounds of the court's power when he entered the temporary order against petitioners for the purpose of complying with the duty imposed upon him by the Sixth Amendment and this Court's decisions in *Sheppard* and *Branzburg*. And, he did so only after convening a hearing at which evidence was introduced which clearly substantiated the fact that the threat to the trial was a real one. Thus, as the Nebraska Supreme Court correctly held, the protective order was properly entered against organizations and individuals who had come before the district court, and whose actions prior to the original order by the county court had demonstrated a definite threat to the administration of justice. Further, the district court order was entered only after all due process requirements were met, including a hearing at which a clear showing was made that this was a situation which justified the use of a temporary prior restraint on reporting.

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## CONCLUSION

Like most of the fundamental precepts of our society, free press and fair trial are in many contexts complementary rather than competing values. A free press may alert the community to criminal activity. It may also aid in apprehending suspects or bringing forth witnesses. Freedom of the press, however, is not absolute.



Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. Indeed, without the right to a fair trial other freedoms guaranteed by the Constitution of the United States and the Constitution of each of the several states would lack any means of vindication. The integrity of the jury is of primary importance.

Obviously pretrial publication of facts and issues of a particular criminal case may generate bias among persons ultimately chosen as jurors to hear the case. The same could have happened in this case. Specifically, after this Court granted certiorari, Erwin Charles Simants was tried to a jury on the six counts of murder in the first degree of which he was charged (Joint Appendix 4). He was found guilty of murder in the first degree by that jury on each of the six counts. After it returned the verdict Judge Stuart addressed the jurors. He explained to them some of the events that preceded the trial. He advised them that they were released from their obligation as jurors and that they were no longer subject to the oath he gave them as jurors. He then told them he would like to take a straw vote. First he asked how many of them could have been fair and impartial jurors if they had read or heard in the media before this trial started that Erwin Charles Simants had confessed? One juror held up his hand. Judge Stuart then asked how many could not have acted as jurors in this case if they had known that Erwin Charles Simants had confessed before they were called as jurors. Thereupon nine (9) members of the jury held up their hands, one member apparently did not vote. He then asked them how many would have been able to take an oath that they could be

a fair and impartial juror in this case if they had read in the media the text of Erwin Charles Simants' confession before they were called as jurors? One juror held up his hand. Judge Stuart then asked how many of them could not have taken the oath to be a fair and impartial juror if they had read in the media the text of Erwin Charles Simants' confession before they were called as jurors? Thereupon eleven (11) members of the jury held up their hands. The conclusion is inescapable. The judgment of the Supreme Court of Nebraska in this case is in all respects proper. The complaints of the petitioners are untenable.

Respectfully submitted,

PAUL L. DOUGLAS

Attorney General of Nebraska

HAROLD MOSHER

Assistant Attorney General

State of Nebraska

2115 State Capitol Building

Lincoln, Nebraska 68509

*Attorneys for the Honorable Hugh Stuart, Judge, District Court in and for Lincoln County, Nebraska, Respondent.*

MAR 3 1976

MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1975

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No. 75-817

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NEBRASKA PRESS ASSOCIATION, *et al.*,

*Petitioners,*

v.

HUGH STUART, JUDGE, DISTRICT COURT  
OF LINCOLN COUNTY, NEBRASKA, *et al.*,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF NEBRASKA

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**BRIEF OF RESPONDENT-INTERVENOR,  
ERWIN CHARLES SIMANTS**

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LEONARD P. VYHNALEK

Beatty, Morgan & Vyhnalek

Box 548, 212 No. Dewey

North Platte, Nebraska 69101

KEITH N. BYSTROM

Public Defender - Lincoln Co.

Box 808, 100 E. 5th

North Platte, Nebraska 69101

*Attorneys for Respondent-Intervenor*

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM 1975

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No. 75-817

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NEBRASKA PRESS ASSOCIATION, *et al.*,  
*Petitioners,*

v.

HUGH STUART, JUDGE, DISTRICT COURT  
OF LINCOLN COUNTY, NEBRASKA, *et al.*,  
*Respondents.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF NEBRASKA

---

BRIEF OF RESPONDENT-INTERVENOR,  
ERWIN CHARLES SIMANTS

---

**OPINIONS AND ORDERS BELOW**

The respondent herein agrees with the statement made in petitioners' brief with regard to the opinions and orders below.

## JURISDICTION

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. The jurisdiction of this Court was invoked pursuant to 28 U.S.C., Sec. 1257(3) (1973).

## QUESTIONS PRESENTED

1. Whether freedom of the press as outlined in Amendment One to the Constitution of the United States grants an unqualified right to the press to publish any and all matters involved in a criminal trial or whether it is necessary to balance the Sixth Amendment rights of the defendant to a trial by a fair and impartial jury against the rights of the press under the First Amendment by allowing Courts to enter restrictive orders as to what may be printed by way of pre-trial publicity.

2. Whether a trial court when confronted with evidence of press coverage and based upon a knowledge of the community in which a trial is to be had and the amount of publicity being generated in the community concerning such a case may constitutionally place restriction upon the dissemination of pre-trial publicity.

3. Whether the order of the Nebraska Supreme Court entered on December 1, 1975, can be sustained as a matter of law and fact.

4. Whether the issues presented in the instant case are moot.

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the Constitution of the United States provides as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Sixth Amendment of the Constitution of the United States provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment of the United States Constitution provides in part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."



## STATEMENT OF THE CASE

The respondent herein agrees with the Statement of the Case as set forth in petitioners' brief at pages 4 through 23, however, respondent herein does not agree with the statements as set forth on page 21 of the petitioners' brief herein that the question involved before this Court has not been mooted by the expiration of the Nebraska Supreme Court's order and, further, disagrees with and does not accept as accurate the affidavit made at (JA 14-16, 8) of the Statement of the Case of petitioners herein – the affidavit of Kiley Armstrong.

## SUMMARY OF ARGUMENT

By necessity the First and Sixth Amendment of Constitution of the United States, being "preferred amendments to that document" present a clash as between the respective rights enunciated under those amendments. While a Court has inherent power to protect itself and its processes with a variety of means in order to insure that a criminal defendant obtain a fair trial, it is nevertheless necessary in matters that gain a great deal of press attention, that the Courts, in order to insure that the defendant be given a fair trial, must by necessity have included within their inherent powers the powers to protect their processes and the ability to enter prior restrictive orders on the publication of news items in order to insure that a potential juror does not base opinions upon items related through the press which may or may not be admitted at trial and thereby color his judgment with regard to an ultimate decision

on the facts of a particular case on information and evidence. The various palliative means by which a Court may secure an impartial jury and the means of screening jurors are not in and of themselves adequate to insure that a defendant obtain a fair trial and where a clear and present danger exists that a defendant may not be able to obtain a fair trial, it is imperative that the Court, either by way of an order based upon motions filed by counsel in the matter, or *sua sponte*, issues orders restricting press coverage. The First Amendment to the Constitution of the United States does not present an absolute right to publish with impunity but by necessity and in order to preserve the effectiveness of the entire document and particularly the First and Sixth Amendments to the Constitution, it is necessary to engage in a balancing of interests in order to allow that both Amendments be given equal footing in preserving both the rights of freedom of the press and a fair trial for a defendant in a criminal case. The order of the Supreme Court having expired with the selection of a jury in the case of *State of Nebraska v. Erwin Charles Simants*, the issues presented here are moot.

## ARGUMENT

We would agree with the statement made in *Bridges v. California*, 314 U.S. 252, 260 (1941), that,

" \* \* \* free speech and fair trials are two of the most cherished policies of our civilization and it would be a trying task to choose between them."

However, based upon the facts and circumstances of the matter now before the Court and based upon the

many factors which affect the trial of a defendant in a criminal case, it is necessary to strike a balance between the two Amendments to insure that the defendant obtain a fair trial and that the press be able to pursue its function of informing the general public with regard to the operations of its government and continue to maintain the integrity of the two Amendments to the Constitution of the United States that are involved.

# I.

## TRIAL OF A CRIMINAL CASE DOES NOT COMMENCE UNTIL A JURY IS SWORN TO HEAR THE EVIDENCE.

In order to place the matter before the Court in proper perspective, it is submitted that the trial of a criminal case begins at the time a jury of the prescribed number of 12 individuals is sworn and ready to hear the evidence to be presented in a case. In this instance, Nebraska Statutes provide in Section 29-2016, R.R.S. 1943, as amended,

"After the jury has been impaneled and sworn, the trial shall proceed in the following order: (1) The counsel for the state must state the case of the prosecution and may briefly state the evidence by which he expects to sustain it; (2) the defendant or his counsel must then state his defense and may briefly state the evidence he expects to offer in support of it; (3) the state must first produce its evidence; the defendant will then produce his evidence; (4) the state will then be confined to rebutting evidence, unless the court for good reason in furtherance of justice, shall permit it to offer evidence in chief; (5) when the evidence in

concluded, either party may request instructions to the jury on the points of law, which shall be given or refused by the court, which instructions shall be reduced to writing if either require it; (6) when the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury; (7) the court after the argument is concluded shall immediately and before proceeding with other business charge the jury, which charge or any charge given after the conclusion of the argument shall be reduced to writing by the court, if either party requests it before the argument to the jury is commenced; and such charge or charges or any other charge or instruction provided for in this section, when so written and given, shall in no case be orally qualified, modified, or in any manner explained to the jury by the court; and all written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court, and shall remain on file with the papers of the case."

Section 29-2007, R.R.S. 1943, as amended, provides as follows:

"All challenges for cause shall be tried by the court, on the oath of the person challenged, on or other evidence, and such challenge shall be made before the jury is sworn and not afterward."

It is readily apparent from a reading of the two sections above that anything that transpires in the pre-trial processes prior to the time of the swearing of the jury is a matter separate from trial and, therefore, anything affecting the case prior to the time that a jury is sworn should be considered as pre-trial publicity and should fall within the area that may be restricted with



regard to the publication of items and news items from such pre-trial proceedings. The question of when a trial commences is governed by the applicable statutes and even where it has been considered that voir dire examination of a jury is considered part of the trial, it is not to be considered a trial upon the facts. *Pfleeger v. Swanson*, 229 Or. 254, 367 P.2d 406, and further, it has been held that the impaneling of a jury is mere preparation for a trial. *Yulee v. Vose*, 99 U.S. 539 (1879).

## II.

### ANY PUBLICITY GIVEN A CASE PRIOR TO THE TIME A JURY IS SWORN IS PRE-TRIAL PUBLICITY.

The above is advanced to the Court to justify a restriction as to pre-trial publicity as opposed to publicity during a trial as there is no serious contention made here that once a jury is sworn and a Court can take the proper measures to sequester a jury and employ other means to protect its processes that then the Court could allow publication of all items concerning the trial as the jury could not be tainted by such publicity except perhaps as required under *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The allowance of judicious restrictions on pre-trial publicity can and does cure many of the ills that arise during the course of a jury selection with regard to the ability of counsel to select an impartial jury that cannot be cured in any manner except by restrictions on pre-trial publicity. First of all, during the course of the processes leading to trial and before the jury has been sworn,

such as the hearing on the setting of bond, the preliminary hearing, the various pre-trial motions, arraignment, and jury selection, it is often necessary for both the prosecution and the defense to introduce certain evidence, evidence which in some instances may not be admissible at trial, and evidence which may be pertinent to the pre-trial procedure but not the merits of the case. Dissemination of this information throughout the community from which the jury is to be selected, prior to trial has the effect of tainting the thinking of any potential jurors that may be eventually selected in the case. Secondly, the press does not generally limit itself to mere recitations of the facts of the case but engages in the printing of various personal sketches both of the defendant and of the victim or victims, of the principals to the trial, of the defendant's family and the victim's family, all of which can be prejudicial to the defendant and all of which could tend to create an atmosphere impairing the selection of an impartial jury.

The factual matters in *State of Nebraska v. Erwin Charles Simants*, in the District Court of Lincoln County, Nebraska, out of which the order of the Supreme Court of Nebraska arose, was a case in which the fact situation were notorious. The defendant was accused of six felony murders which included within those counts the commission of or the attempted commission of three sexual assaults upon the female victims of the murders. Information on the sexual assaults was available to the prosecution on the night of the incident, October 18, 1975, but was not revealed to the press. Evidence of the sexual activity which could have occurred after death quite readily is such as would inflame the passions of anyone who would potentially



sit upon a jury in this matter. The press gave the incident a great deal of publicity immediately after the incident, all of which the County Judge of Lincoln County, Nebraska and the District Judge of Lincoln County, Nebraska were aware of at the time of the entry of their respective orders.<sup>1</sup> In support of the orders entered and particularly the order issued by Judge Stuart, the Lincoln County District Judge, the situs of the incident is a sparsely populated county in West Central Nebraska with a County Seat at North Platte with a population of 21,000 individuals with another 9,000 individuals residing in the County. The Village of Sutherland, the town in which the incident occurred has a population of 800. News is rapidly disseminated, either through the press or word of mouth throughout the entire area. The Lincoln County area is saturated with news media to include local, regional, and state newspapers, three radio stations, and three television stations. Information is available to all and in a community so small in size is more rapidly and readily conveyed by word of mouth and gossip than it would be in a large metropolitan area or populus area.

<sup>1</sup>The North Platte Telegraph devoted page 1 of its Monday, October 21, 1975 issue carried an article complete with pictures of the defendant, his alleged victims, a recitation of what had allegedly occurred, together with articles showing the Sutherland community attitude, and an article on the funeral of the victims and a story concerning the fact that reporters on the case to include reporters from several papers and to include Associated Press and United Press International were cooperating to disseminate information (JA-83). Other evidence of what was disseminated during the period of time prior to the issuance of the restriction order by the District Court is found at (JA 84-98).

### III.

#### THE SIXTH AMENDMENT RIGHT OF A DEFENDANT TO A TRIAL BY AN IMPARTIAL JURY IS A PERSONAL RIGHT.

The Sixth Amendment of the Constitution of the United States makes it clear that a defendant in a criminal case is entitled as a matter of personal right to a fair and impartial trial by jury. The rights to a free press enunciated under the First Amendment to the Constitution of the United States and the right to a fair and impartial trial is one of the mainstays of our democracy. While the Sixth Amendment requires a trial by an impartial jury, it is silent as to what criteria shall be applied or what standards shall be used in assessing the degree of impartiality any one juror or any one jury shall have as a qualification to sit on the trial of a criminal case. The United States Supreme Court's earlier statements with regard to what constitutes an impartial juror are set forth in *Irvin v. Doud*, 366 U.S. 717 (1961), in which it appears that if a juror who has knowledge of the facts of a particular case prior to the time of trial and upon his voir dire examination relates that he can set aside any pre-conceptions or opinions that he has, concerning the merits of the case, he is, therefore, impartial and is, therefore, qualified to sit. In *Irvin v. Doud*, supra, the Court said citing the case of *Spies v. Illinois*, 123 U.S. 131 (1887):

"This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression

or opinion and render a verdict based on the evidence presented in court."

This Court also recognized in *Marshall v. United States*, 360 U.S. 310 (1959) that dissemination of news items that reach potential jurors can have a deleterious effect upon the impartial nature of a juror called upon to sit in a particular case and at page 313 of the opinion the Court said:

"We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence."

The Court further cited the case of *Michelson v. United States*, 335 U.S. 469. The Court then gave greater dimension to the concept of what constitutes an impartial juror in the case of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). In that case, jurors who expressed qualms about the infliction of the death penalty in a murder case were successfully stricken by the prosecution. The Court said:

"A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, 'free to select or reject as it (sees) fit, 'a jury that must choose between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life or death. Yet, in a

nation of less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment – of all who would be reluctant to pronounce the extreme penalty – such a jury can speak only for a distinct and dwindling minority.

If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.' "

The question that has arisen as to whether or not a juror exposed to news items concerning the trial of a case and who as the result of watching, reading and hearing such news items develops a preconceived opinion, can lay aside that opinion and render a judgment based upon the facts as presented at trial has had a great deal written about it but there seems to be little empirical data available and further study is needed to determine the effect of news items upon the minds of jurors and their ability to sit impartially on a



case after they have been exposed to news items concerning a particular case.<sup>2</sup>

While studies are being conducted with regard to the effect of news items upon potential jurors and before further data is completed and concrete solutions can be made, everything must be done to insure that a fair trial can be had and the only matter in which that can be accomplished is to allow restrictive orders with regard to pre-trial publicity and an effort to keep a potential jury insulated from the facts of a case until they are sworn and ready to accept the facts as provided by both sides to the litigation and can determine such facts based upon the instructions of the trial judge.

The American Bar Association has conducted lengthy studies into the area involved in this litigation and with regard to the questions here has prepared among their Standards for the Administration of Criminal Justice the, "The American Bar Association Project on Standards for Criminal Justice, Standards Relating to Fair Trial, and Free Press, approved draft 1968 in which is provided Rule 3.1, where recommendation is

<sup>2</sup>In The American Bar Association Project on Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press Approved Draft 1968, the problem with regard to studies available on the effect of such news media is discussed and at Note 136 this Project cites:

"136. See, e.g. Free Press-Fair Trial, A Report of the Proceedings of a Conference on Prejudicial News Reporting in Criminal Cases (Inbau ed. 1964); Bureau of Applied Social Research, Graduate School of Journalism, and Project of Effective Justice, Columbia University The Effects of News Media on Jury Verdicts; Examination of the Problem and a Proposal (Prepared for the National Conference of State Trial Judges, May 1964)."

made that a rule be adopted in each jurisdiction by the appropriate Court as follows:

"3.1 Pretrial hearings.

"It is recommended that the following rule be adopted in each jurisdiction by the appropriate court:

Motion to exclude public from all or part of pretrial hearing. In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference. With the consent of the defendant, the presiding officer may take such action on his own motion or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial. Nothing in this rule is intended to interfere with the power of the presiding officer in any pretrial hearing to caution those present that dissemination of certain information by any means of public communication may jeopardize the right to a fair trial by an impartial jury."

It does not appear anywhere that the "trial on the facts" or "trial on the merits" should be closed to the scrutiny of the press or the public but it does appear that a different criteria should be applied to the



dissemination of pretrial publicity and that is that pre-trial hearings may simply be closed to protect the Court and its processes by insulating potential jurors from excessive pretrial publicity.<sup>3</sup>

#### IV.

#### COURTS HAVE THE INHERENT POWER TO PROTECT THEIR PROCESSES.

The ability and inherent power of Courts to protect themselves and their processes is well established in American Law. *Lehman v. State*, (Okla. Crim.), 355 P. 7, 444. *Wassung v. Wassung*, 136 Neb. 440, 286 NW 340. *Wood v. Georgia*, 370 U.S. 375 (1962). Even to the extent that they may correct matters which have been wrongfully done by virtue of their processes. *U.S. v. Morgan*, 307 U.S. 183 (1939). It is, therefore, quite obvious that Courts have the right to punish those through their contempt powers that would interfere with their processes and this would include the members of the press, who through their publication, would interfere with the orderly processes of the Court system.

<sup>3</sup>*Sheppard v. Maxwell*, could present an exception to the statement made here in that the opinion of the Court in referring to the exaggerated factual situation there spoke to the effect:

"If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."

An indication could be had here that in those cases where it appeared necessary restrictions on reporting could be placed upon reports of the actual trial.

#### V.

#### THE FIRST AMENDMENT TO THE CONSTITUTION DOES NOT PROVIDE FOR AN UNLIMITED, UNQUALIFIED RIGHT TO FREEDOM OF THE PRESS.

It must be stated that while the petitioners would ask that the press has unqualified rights it must be remembered that the right to free speech and free press is not absolute, is not unlimited, and under proper circumstances can be controlled.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568, (1942), the Court said:

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that right of free speech is not absolute at all times and under all circumstances."

While the above case is one involving the constitutionality of a statute prohibiting the use of certain words, nevertheless, the case does stand for the proposition that where utterances and communications are of such a nature that injury can result by the use of them, they may be suppressed. This case cites the earlier case of *Bridges v. Calif.*, 314 U.S. 252 (1919), in which the Court discussed the "clear and present danger" cases with regard to the effect of publicity upon the judicial processes and in that case the Court said:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evil that Congress has the right to prevent. It is a question of proximity and degree \* \* \*"

Turning from these earlier cases to *Sheppard v. Maxwell*, 384 U.S. 333 (1966), it is readily apparent that where there is a clear and present danger that publicity exceeding the normal bounds of reporting and where news media representations tend to saturate an area, a Court must take action to prevent such publicity in order to assure that the defendant can obtain the due process requirements of a fair trial by an impartial jury free from outside influences. In *Sheppard v. Maxwell*, supra, the Court after reviewing all of the incidents which occurred from the time of the incident through the course of the trial and which, to be sure, presented exaggerated situations of press activity, the Court said:

"But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the Judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the Judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered."

The Court then went on to say:

"But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The Courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."

It is readily obvious from a reading of the Sheppard decision, that a dividing line must be drawn that would preserve the integrity and effectiveness of both the First and the Sixth Amendment of the Constitution of the United States. Where the dividing line should be drawn

cannot be based upon generalities but must be based upon the particular interest involved in each case, and upon the community's evaluation of the factors involved and as they affect the interests of each provision to the Constitution of the United States and as the absence of one would affect the other in a free democracy. The Nebraska Supreme Court in considering the question before it with regard to the balancing of the interests in this case chose to incorporate Rule 3.1 of The American Bar Association, Project of Standards of Criminal Justice Standards Relating to Fair Trial and Free Press, approved draft 1968. *State ex rel. Press Assn. v. Stuart*, 63 S.C.J. 783, 194 Neb. 783.

Pursuant to the provisions of the Sixth Amendment, it is apparent that one accused of crime would have the right to eliminate the public and the press from at least pre-trial proceedings. The Sixth Amendment guarantees the right to "public trial" and, as pointed out before in this brief, the actual trial of a criminal case does not begin until the jury is sworn and ready to hear the evidence. The accused may not have the right to a "private trial" but it would appear that he does have the right to have members of the press and the public excluded from hearings before trial. In *United States v. American Radiator & Standard Sanitary Corporation*, (1967) (DC Ta) 274 F. Supp. 790, although the Court rejected the request for a closed hearing on a motion to suppress certain evidence, the Court nevertheless did comment that the question of closing a hearing is one of judicial discretion. It should be noted that in some jurisdictions, statutes provide for the closing of certain hearings and pre-trial matters and that these statutes have withstood constitutional attacks as being permissible balances of the rights of the public and of the



rights of an accused to a fair trial. In *State v. Meek*, 9 Ariz. App. 149, 450 P. 2d 1115, *certiorari denied*, 396 U.S. 847, the Court allowed the accused to have the press excluded from a preliminary hearing at the request of the accused and there said:

"That this was a constitutionally permissible balance of the interests of the public as against the rights of an accused to a fair trial."

In *Asbill v. Fisher*, 84 Nev. 414, 442 P. 2d 916 (1968), where a statute provided that only Court officials could be present at preliminary examinations and that all other parties could be excluded, the Court held that a statute such as this was permissible in the interests of obtaining a fair trial for the defendant in that most often in the accusatory processes the preliminary hearing is a time when only the prosecution's version of the case is presented with the possibility of prejudice resulting therefrom. With a similar statute in *People v. Elliott*, 54 Cal. 2d 498, 6 Cal. Rptr. 753, 354 P. 2d 225 (1960), the Court upheld a statute allowing the accused to make a request for a closed preliminary examination stating that the preliminary examination is often a time when only the prosecution presents evidence and the defendant remains silent once it appears that probable cause has been established. One of the purposes the Court pointed out for the opportunity for the defendant to close to press and public such a hearing is to protect his right to an impartial and unbiased jury by preventing the dissemination of information presented at the time of a preliminary examination.<sup>4</sup>

<sup>4</sup> Among those states that have statutory rules for closing of a preliminary hearing either in whole or in part are:

Arizona, Ariz. R. Crim. P. 27.

California, Cal. Penal Code § 868.

Idaho, Idaho Code Ann. § 19-811

Montana, Mont. Rev. Code Ann. 94-6110.

Nevada, Nev. Rev. Stat. § 171.445

North Dakota, N. D. Cent. Code § 29-07-14

## VI.

### THE NEBRASKA SUPREME COURT PROPERLY ENTERED AN ORDER OF RESTRICTING PRETRIAL PUBLICITY IN THE CASE OF STATE OF NEBRASKA V. ERWIN CHARLES SIMANTS.

Part of the potential dangers in the matter involved here can be exemplified by the affidavit of Kiley Armstrong, where in Paragraph 8 of the affidavit is misquoted a note written by the defendant as it was testified to at the time of the preliminary hearing by an investigator of the Nebraska State Patrol and further the Affidavit misquotes defense counsel in Paragraph 9 of the affidavit with regard to his statement concerning statements made by respondent (JA 13).<sup>5</sup> While

<sup>5</sup> In her affidavit, Kiley Armstrong states in Paragraph 8 that a note by the defendant read "I am sorry. Do not cry. It was the only way.", and that the same was testified to by Terry Livingood, Nebraska Patrol Investigator. The testimony given by Investigator Livingood was that the note read, "I am sorry to all. It is the best way out. Do not cry." Transcript of Preliminary Hearing, State of Nebraska v. Erwin Charles Simants, County Court of Lincoln County, Nebraska, Case No. 75-789. The testimony given by Investigator Livingood indicates a suicide note while the statement as related by Kiley Armstrong does not.

In Paragraph 9 of her affidavit, Kiley Armstrong quotes one of the defense attorneys upon calling for a recess to examine the transcript of the "confession - I mean statement" when in fact counsel said, "Your honor, I plan or I'd like to ask a few questions of the sheriff on voir dire prior to making any objection to this confession or this statement. Could we have a few minutes for a recess?"

The affidavit would show that the statement made by defense counsel characterized the statement as a confession which it did not. In any respect, at that point in time publication would have been prejudicial.



reporting the evidence in preliminary matters as exemplified above, many times inadvertently statements are distorted from the actual context and also from their actual wording as they appear at the time of preliminary proceedings and it is in this distorted fashion that such statements appear before the general public through the news media with the potential of contaminating the thinking of prospective jurors. Many propositions have been advanced for the curing of the problems arising out of publicity that may adversely affect the defendant's right to a fair trial. Among these are change of venue, sequestration of the jury, continuances, mistrials and reversals. In line with the above prescribed alternatives as suggested by the petitioners herein, further allegation is made that the defendant did not take any steps to assure fair trial other than to ask for prior restraint on the press. The defendant did, in fact, ask for a change of venue moved that the potential jurors be voir dired at one time in order that any matters brought out during the course of voir dire of a prejudicial nature would not contaminate the entire venire, moved to sequester the witnesses, moved to sequester the jury. All of the motions except for a change of venue were granted by the trial judge. As in *Sheppard v. Maxwell*, these remedies are mere palliatives and the alternatives presented to the Court are non-effective in that it is not possible, for instance, to sequester everyone in the community who may be potential jurors in that sequestration is not possible until the jury is selected and sworn. With regard to continuances to permit a "cooling off" period, Nebraska statutes provide that a defendant, in a criminal case, must be brought to trial within 6 months

from the date of the filing of the information.<sup>6</sup> For where it is concerned, Section 29-1207, provides that a defendant in a criminal case be brought to trial within 6 months after the date of the filing of the information and the argument that the petitioner made to the effect that a continuance could be relied upon would require the defendant yet to waive another constitutional guarantee under the Sixth Amendment to the Constitution of the United States and that is his right to a speedy and public trial. During the course of these proceedings the defendant-respondent, Erwin Charles Simants, has pursued the matter involving the question of law in press coverage of pre-trial proceedings in order to protect and preserve any issues arising out of the possibility of adverse publicity to his cause in the Lincoln County District Court and upon the joint request for restriction of press coverage and has entered his intervention in all matters arising out of this question (JA 117). The District Court of Lincoln County, Nebraska had before the at the hearing held on the night of October 23, 1975, ample evidence upon which to conclude that a restriction on press coverage was in order. Even without evidence before it would appear from *Sheppard v. Maxwell*, supra, that the court has a duty to take action once it has been brought to its attention that adverse publicity might, in fact, impair the right of the defendant to secure a fair trial.

The decision of the Nebraska Supreme Court does not defy analysis as contended by the petitioners. The Court recognizes the guarantees of freedom of speech and of the press as co-equal amendments to the

<sup>6</sup>Section 29-1207, R.R.S. 1943, 1974 Cum. Supp. provides: "(1) Every person indicted or informed against for any offense shall be brought to trial within six months, \* \* \*"

Constitution, *State of Nebraska v. Simants*, supra, and further recognizes that a balancing of the defendant to rely upon continuances in the State of Nebraska is to ask him to again waive another right under the Sixth Amendment of the Constitution of the United States, his right to a speed trial. With regard to the other alternatives proposed all these are available only at the time of trial and would be available to the defendant only after the damage has been done by excessive pre-trial publicity. The petitioners herein contend that all the proceeding in a court action should be held open to the press in that the press must monitor processes and show to the public any corruption or irregularities that may occur in the court system and its processes. Cases such as the one out of which the instant issue arose are rarities and it is unlikely there would be an occurrence of corruption of the courts' practices with as much scrutiny and interest as was afforded this case. Corruption or subversion would be most likely occur in the day to day, humdrum activities that the press rarely takes an interest in save for printing the headings of the cases in an obscure "on the record" column or on the back pages of a local daily. Following the mandates of the restrictions as contemplated by Rule 3.1 as adopted by the Nebraska Supreme Court would more than adequately provide for these rare and exceptional cases that brings the intensive interest of the various members of the press.<sup>7</sup> As most pretrial hearings are held in Courts of record the press will undoubtedly have access to the records of such and could publish these matters once the jury was sequestered and prejudicial interests under both Amendments is necessary in order to

<sup>7</sup>Rule 3.1 provides that a record be made of hearings.

preserve the integrity of each. The Court was confronted by the absolutist position of the press, the relators, insofar as the freedom of the press is concerned and went on to discuss that insofar as the matters before it were concerned they had considered the statements of the representative of the press that freedom of the press be not impinged in the slightest degree. The Court, in relying upon the case of *Branzburg v. Hayes*, 408 U.S. 665 (1972). This case involved the appearance of a reporter before a Grand Jury who relied upon First Amendment of Rights in refusing to appear. It would appear from the opinion that this Court nevertheless did consider the needs for balancing of interests to provide for integrity in the First Amendment and the administration of justice. The Court said at page 683 of its opinion:

"The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish."

The Court went on to say at page 684 of the opinion:

"Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal."

The Court then went on to cite *Sheppard v. Maxwell*, supra. After discussing the constitutional basis for grand jury investigation the Court said further at page 690:



" \* \* \* fair and effective law enforcement aimed at providing security for the person and property of the individual is the fundamental function of government and the grant jury plays an important constitutional mandated role in this process."

Without belaboring the point further, it is obvious that First Amendment guarantees can be qualified in the interests of balance and the Supreme Court of the State of Nebraska in issuing its order did so and did so rightfully.

## VII.

### THE QUESTION INVOLVED HERE IS MOOT.

The order of the Supreme Court of the State of Nebraska ceased at the time a jury was sworn to hear the evidence in the State of Nebraska v. Erwin Charles Simants in the Lincoln County District Court. The restrictive order in the case at bar originally entered by Lincoln County Judge Ronald A. Ruff on October 21, 1975, and subsequently upheld in pertinent parts by District Judge Hugh Stuart, the Honorable Justice Blackmun of the Supreme Court of the United States and the Supreme Court of the State of Nebraska has, by its own terms, ceased in existence on January 7, 1976, the date 12 jurors were sworn to hear the evidence in the case. Therefore, there exists at the time of this appeal no case or controversy between the named parties to this case.

It is well settled that federal courts may act only in the context of a justiciable case or controversy and may

not act in a vacuum. *Benton v. Maryland*, 395 U.S. 784, 788 (1969). The exercise of judicial power of federal courts depends on the existence of a case or controversy. Article III, Section 2, United States Constitution. The usual rule in federal cases is that an actual controversy must exist to all stages of appellate or upon a review upon certiorari and not simply at the date the action is initiated. *S.E.C. v. Medical Committee for Human Rights*, 404 U.S. 403 (1972). In *Times-Picayune Publishing Company v. Schulingkamp*, 419 U.S. 1301 (1974), in which Mr. Justice Powell in chambers considering a matter where a restrictive order appeal, although not as concerned with pre-trial matters as the order in this case, was dismissed as being moot by this Court, 420 U.S. 985 (1975).

As pointed out in brief for petitioners, the Court has created exceptions to the above criteria. Specifically, certain rules must be followed in the certification of class actions — *Roe v. Wade*, 410 U.S. 113 (1973), a highly discretionary, hard-to-define exception of questions which were "capable of repetition yet evading review," *Southern Pacific Company v. I.C.C.*, 219 U.S. 498 (1911); *More v. Ogilvie*, 394, U.S. 814 (1969).

This case obviously is not brought as a class action and it is respondent's contention that the question presented to the Court does not fit into the limited, categorical exception of "capable of repetition yet evading review." That standard applies only to the named parties in this case and not to the hypothetical and conjectural fears expressed by the press elsewhere in the country.

In *Southern Pacific Terminal Company v. I.C.C.*, supra, the Court expressed concern that the named defendants in that case could be expected to act



contrary to the rights asserted by the particular named plaintiffs. The Court expressed the same concern for the named parties continuing labor activities in *Carroll v. President and Commissioners of Princess Ann*, 393 U.S. 175, (1968). Also, in *Sosna v. Iowa*, 42 L. Ed. 2d 532 (1975), the Court has shown that capable repetition end standard applies only to the named parties in the particular case under review when it is specifically stated that

“\*\*\* unless we were to speculate that she (Sosna) may move from Iowa only to return and later seek a divorce within one year from her return. The concern that prompted this Court’s holdings in *Southern Pacific* and *More*, supra, do not govern applicant situation.”

Therefore, in order for that standard to apply here the Court must speculate as to the possibility of Judge Hugh Stuart having to order a restrictive order on the press in the future as “capable of repetition” standard was not applicable in *Sosna* it is not applicable in the case at bar. In the present case, such concern is not apparent. A case of the magnitude of the crime involved here had never before reached the criminal justice system in Lincoln County, Nebraska. The fact of its reoccurrence is improbable and completely hypothetical. District Judge Hugh Stuart granted a motion to sequester the jury in the Simants case the first time in his eleven years on the bench he thought it necessary to do so. In order for the South Pacific standard to be applicable here, a showing must be made by petitioners that such restrictive order is “capable of repetition by the named party, Judge Hugh Stuart.” In Lincoln County, Nebraska this has not been done and, therefore, the case must be dismissed as being moot.

## CONCLUSION

If it does not appear to the Court that the question here is moot, we ask the Court to consider that the District Court of Lincoln County, Nebraska had before it sufficient amount of evidence upon which it could base a finding that a “clear and present danger” existed which could impair the defendant’s right to a fair and impartial trial by jury. By necessity a restrictive order such as the one entered here by the Nebraska Courts cannot be based upon absolutes but must be based upon the knowledge of the Judge from the evidence before him and his knowledge of the community in which the trial was to take place. The First Amendment rights of the press were not and could not be so damaged by an order such as the one entered here for once the jury was sworn the orders entered terminated and the press allowed to report and publish “with impunity”. We most vigorously urge that the issue of restrictive orders such as were raised by the Courts here concerning pre-trial publicity be approved by this Court and they hold that where a situation arises that where Sixth Amendment rights may be impaired a balance must be stricken between the First and Sixth Amendments in order to protect the integrity of both Amendments.

Respectfully submitted,

LEONARD P. VYHNALEK

Beatty, Morgan & Vyhnalek  
Box 548, 212 No. Dewey  
North Platte, Nebraska 69101

KEITH N. BYSTROM

Public Defender - Lincoln Co.  
Box 808, 100 E. 5th  
North Platte, Nebraska 69101

*Attorneys for Respondent-Intervenor*

APR 13 1976

MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1975

**No. 75-817**

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NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD  
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NICHOLLS; JAMES HUTTENMAIER; WILLIAM EDDY,  
*Petitioners,*

v.

THE HONORABLE HUGH STUART, JUDGE DISTRICT COURT  
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SIMANTS, INTERVENOR, AND THE STATE OF NE-  
BRASKA, INTERVENOR,

*Respondents.*

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On Writ of Certiorari to the  
Supreme Court of the State of Nebraska

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**REPLY BRIEF OF PETITIONERS**

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E. BARRETT PRETTYMAN, JR.  
HOGAN & HARTSON  
815 Connecticut Avenue, N.W.  
Washington, D.C. 20006

JAMES L. KOLEY  
STEPHEN T. MCGILL  
MCGILL, KOLEY & PARSONAGE, P.C.  
Suite 300  
10010 Regency Circle  
Omaha, Nebraska 68114

*Attorneys for Petitioners*

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**REPLY BRIEF OF PETITIONERS**

It is important to note at the outset the concession of the State of Nebraska (Neb. Brief at 15 n.6; see also 41) that each of the cases cited by it in support of the entry of a prior restraint involved unprotected speech, in contradistinction to the "concededly protected speech" involved in this case. Thus, as we originally pointed out, prior restraints on news re-

porting in areas of "protected" speech have never been deemed constitutional, except in the extremely limited national security area noted in our main brief (pp. 46-47). We start from the premise, therefore, that it is Respondents, not Petitioners, who are here seeking a radical departure from past law.<sup>1</sup>

1. There is at least one common thread running through all three of the Respondents' briefs. They first assume that most of the prospective jurors from the immediate vicinity would have seen or heard something in the media about the Simants case in advance of trial—not an unfair assumption in view of the size of the community and the fright caused by the crime. However, Respondents then proceed to assume further that (a) having once seen or heard about the case, prospective jurors would be unable to render a constitutionally fair and impartial verdict, and (b) it would not be possible on voir dire to determine which veniremen had made up their minds about guilt in advance, as opposed to those who could put preconceived notions behind them and render

<sup>1</sup> Our position in this respect has been bolstered by the publication of yet another study of the fair trial—free press issue which concludes, as did its predecessors discussed in our main brief, that: (1) "The Task Force strongly opposes court orders that directly forbid the press to publish or broadcast information about a criminal case during the pre-trial period, nor does the Task Force approve of excluding the press from pre-trial proceedings in order to prevent pre-trial publicity," and (2) "The Task Force believes that an order attempting to prevent the publication during a trial of any information obtained by the press is unconstitutional, representing censorship of precisely the kind that the First Amendment has decided to prohibit." *Rights in Conflict*, Report of the 20th Century Fund Task Force on Justice, Publicity, and The First Amendment, 10, 15, and 16 (1976).

a verdict on the evidence at trial.<sup>2</sup> Not only are these assumptions unwarranted on this record or in law generally, but they are specifically prohibited in a number of states, including Nebraska.

Thus, Nebraska has a statute of long standing which provides in relevant part:

29-2006. The following shall be good causes for challenge to any person called as a juror, or alternate juror, on the trial of any indictment: \* \* \* Second. That he has formed or expressed an opinion as to the guilt or innocence of the accused; Provided, *if a juror, or alternate juror, shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror, or alternate juror, as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper state-*

<sup>2</sup> *E.g.*, "It is submitted as indisputable that pre-trial publicity, in certain cases, can irreparably damage a criminal defendant's conceded right to a fair trial" (Neb. Brief at 9); the order was entered "at a time when there was no other way to protect prospective jurors from information which they could not fairly be expected to ignore. Without this, there could be no impartial jury \* \* \*" (*id.* at 19; footnote deleted); jurors "are, no doubt, influenced by the publicity they are subjected to" (*id.* at 26), "[i]nstructions cannot remove prejudice once it has been engrained in the mind of the potential juror. Such instructions are only effective if given to a jury which was not seated with an established predisposition toward guilt or innocence" (*id.* at 32); continuances are questionably effective "where the entire population of a small community is acutely aware of the relevant facts and the position of the accused in relation to those facts" (Stuart Brief at 19); the press normally prints "various personal sketches both of the defendant and of the victim or victims, of the principals to the trial, of the defendant's family and the victim's family, all of which can be prejudicial to the defendant and all of which could tend to create an atmosphere impairing the selection of an impartial jury" (Simants Brief at 9).

*ments, communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify and the juror, or alternate juror, shall say on oath that he feels able notwithstanding such opinion to render an impartial verdict upon the law and the evidence, the court, if satisfied that said juror, or alternate juror, is impartial, and will render such verdict, may in its discretion admit such juror, or alternate juror, as competent to serve in such case. [Sec. 29-2006, R.R.S. 1943; emphasis added.]*

This statute has been interpreted in a line of cases stretching back almost 100 years to mean that a venireman is not automatically disqualified because he has read newspaper reports about the crime. Even opinions about guilt or innocence from reading or hearing about a case do not act to automatically disqualify. Such veniremen are only disqualified when their source of news is witnesses themselves or their testimony, or when the court is not satisfied, after full examination, that the veniremen can render an impartial verdict.<sup>3</sup>

<sup>3</sup> *E.g., Curry v. State*, 5 Neb. 412 (1877); *Bohanan v. State*, 18 Neb. 57, 24 N.W. 390 (1885); *Basye v. State*, 45 Neb. 277, 63 N.W. 811 (1895); *Rottman v. State*, 63 Neb. 648, 88 N.W. 857 (1902); *Ringer v. State*, 114 Neb. 404, 207 N.W. 682 (1926); *Kitts v. State*, 153 Neb. 784, 46 N.W.2d 158 (1951); *Sundahl v. State*, 154 Neb. 550, 48 N.W.2d 269 (1951); *Fugate v. State*, 169 Neb. 420, 99 N.W.2d 868 (1959). See also *State v. Bautista*, 193 Neb. 476, — N.W.2d — (Neb. April 10, 1975).

For example, in *Fisher v. State*, 154 Neb. 166, 47 N.W.2d 349 (1951), the defendant was convicted of killing her son by whipping him to death with a ruler and a stick. The case was publicized extensively in the North Platte area of Nebraska before trial. One newspaper quoted the County Attorney as saying the coroner's

Nor is the Nebraska Statute unique. A number of states provide that information received by veniremen by way of newspaper accounts or other hearsay does not automatically disqualify them. The California Penal Code is representative:

\* \* \* In a challenge for actual bias, \* \* \* no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, circulars, or other literature, or common notoriety; *provided*, it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him. [California Penal Code § 1076.]

See also North Dakota, § 29-17-38; Oklahoma, 22 § 662; South Dakota, § 23-43-35; Utah, § 77-30-21; Washington, § 4.44.190.

Some states have separate provisions that specifically deal with the problem of information received by way of newspaper reports. For example:

It shall be no cause of challenge to a juror that he may have obtained information of the

jury found the boy's death "hastened by malnutrition" and the result of a "most inhuman beating administered by his mother." 154 Neb. at 168, 47 N.W.2d at 352. Yet the defendant failed to gain reversal because:

The claim of error is predicated on the assumption that the jurors read the matters published and were influenced, prejudiced, and disqualified thereby. This assumption is wholly unsupported. Opportunity for prejudice or disqualification is not sufficient to raise a presumption that they exist. Sec. 29-2006, R.R.S. 1943 \* \* \*. [154 Neb. at 169, 47 N.W.2d at 352.]



matters at issue through newspapers or public journals, if he shall have received no bias or prejudice thereby \* \* \*. [Wisconsin, § 270.17.]

\* \* \*

In the trial of criminal cases it shall not be cause for challenge that a person called to act as a juror has formed or expressed an opinion as to the guilt or innocence of the accused from newspaper reports and rumor, or from either of them, if such a person swear that he can impartially try the case according to the law and evidence notwithstanding such opinion. [Wyoming, § 7-225.]

To the same effect, see Indiana C. Crim. Proc., § 35-1-30-4; Illinois, 78 § 14; Texas, C. Crim. Pro. Art. 35.16; Massachusetts, 234 § 28; Virginia, Rule 3a: 20.

Thus, voir dire becomes an impressive tool in the arsenal used by judges and litigants to guarantee a fair trial, because it is at voir dire that those veniremen who are truly biased are distinguished from those who may have heard about the case but remain open-minded. See *Silverthorne v. United States*, 400 F.2d 627, 635-640 (9th Cir. 1968); Babcock, "Voir Dire: Preserving Its 'Wonderful Power'," 27 Stan. L. Rev. 545, 548-549 (1975).

Simants seems to recognize that voir dire can be effective (Simants Brief at 11-12), and he concedes that little empirical data is available to prove the effect of publicity upon proposed jurors (*id.* at 13-14).<sup>4</sup> However, the briefs of both Nebraska and Judge Stuart reveal a notable lack of regard for voir dire

<sup>4</sup> This should be contrasted with Judge Stuart's assertion that empirical studies have "scientifically established" the effect of pretrial publicity on jurors. Stuart's Brief at 10.

and its ability to winnow out veniremen who are lacking in fairness and impartiality. The State's only reference to voir dire is the single statement, without citation or explanation:

The use of voir dire examination to detect the existence of prejudice arising from extensive publicity and thus ensure avoidance of prejudice to criminal defendants has inherent limitations. [Neb. Brief at 33.]

Judge Stuart discusses voir dire largely on the basis of cases that either are distinguishable<sup>5</sup> or support our position. Judge Stuart's reliance on *United States v. Liddy*, 509 F.2d 428, 434-437 (D.C. Cir. 1974), is certainly inexplicable, because that case held, despite what may have been the most pervasive pretrial publicity in recent history, that one of the chief participants in Watergate received a fair trial, and the court specifically approved as effective a general voir dire examination by the trial court followed by individual questioning of the veniremen who had been exposed to pretrial publicity.<sup>6</sup> And Judge Stuart's citation to

<sup>5</sup> Thus, *Groppi v. Wisconsin*, 400 U.S. 505, 510 (1971), noted that challenges to the venire were not *always* adequate, but the court was making the point that a change of venue was sometimes necessary, and a statutory prohibition against a change of venue violated a defendant's constitutional rights. *Irvin v. Dowd*, 366 U.S. 717, 727-728 (1961), was a case where the voir dire *demonstrated* the clear bias and prejudice of the jury that was allowed to sit, in contrast to a proper use of voir dire to keep such persons off the jury. *Sheppard v. Maxwell*, 384 U.S. 333, 354 n.9 (1966), suggested that a combination of voir dire plus a short continuance would have alleviated many problems at the outset of that trial.

<sup>6</sup> See also *Ristaino v. Ross*, 44 U.S.L.W. 4305, 4308 (U.S. March 3, 1976); *United States v. Tropicano*, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970); *Margoles v. United States*, 407 F.2d 727 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969).

*State v. Van Dugne*, 43 N.J. 369, 204 A.2d 841 (N.J. 1964), is also an odd one, because that case specifically held that even in a capital case where jurors had read about what amounted to a confession, the trial court was free to satisfy itself through extensive voir dire that the prospective jurors had the requisite constitutional impartiality and could sit on the jury.

Only one of Respondents' briefs makes even a passing reference to the recently-decided *Murphy v. Florida*, 421 U.S. 794 (1975). Yet this case made clear that *Estes v. Texas*, 381 U.S. 532 (1965), *Rideau v. Louisiana*, 373 U.S. 723 (1963), and *Sheppard v. Maxwell*, *supra*—cases frequently cited by Respondents<sup>7</sup>—“cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprive the defendant” or his right to trial by an impartial jury. 421 U.S. at 729.

<sup>7</sup> The length to which the State has gone in an attempt to analogize this case with prior case law is shown by its reliance on *Miranda v. Arizona*, 384 U.S. 436 (1966). Neb. Brief at 17. The deprivation of the right of a witness to speak in court is facially distinguishable from the right of the press to speak at all. Again, neither *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), nor *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1972), both cited in the State's brief (p. 18), is a prior restraint case. And in *Buckley v. Valco*, 44 U.S.L.W. 4127 (U.S. January 30, 1976), the Court held that those challenged portions of the Federal Election Campaign Act of 1974 (not 1971) that were held constitutional only passed muster because they were not aimed at the press. Here, the very purpose of the restraint is to suppress speech and press privilege. Finally, the assumption (Neb. Brief at 34)—and it is only that—that decisions relating to contempt may be used to support the adoption of a clear and present danger test in prior restraint cases is totally unsupported by any prior restraint case in American history.

Thus, the argument in support of a prior restraint that certain publicity “can prevent the impaneling of a constitutionally acceptable jury” (Neb. Brief at 9) is simply contrary to law and history: no jury has ever been held constitutionally unacceptable because of the failure of a court to enter a prior restraint. Instead, the relevant cases, the statutes noted above, and actual experience all establish that:

1. Pretrial publicity, even when pervasive, is not necessarily read, heard or seen by all members of the community which is theoretically “covered” by the media.

2. Many of those who do read, hear or see the publicity do not absorb or retain it.

3. Even those who retain or absorb the publicity are normally perfectly capable, upon proper instruction, of rendering a fair and impartial verdict based entirely upon the evidence at trial.

4. As to those who are not able to render such a fair and impartial verdict, the voir dire, properly conducted on both a general and individualized basis, is fully capable of discovering and removing them from the panel. Even in the extraordinary case,<sup>8</sup> voir

<sup>8</sup> Nebraska has completely misunderstood (Neb. Brief at 29) the reference in our main brief (p. 30) to the “most exceptional case.” Rather, as the context clearly shows, Petitioners were making the point that carefully selected jurors who had read about the case could nevertheless exercise their independent judgment except in the most extraordinary case, in which event other means such as continuances, change of venue and the like should be used to insure a fair jury.

dire coupled with a continuance<sup>9</sup> or a change of venue<sup>10</sup> will prevent injury.

Under these circumstances, the idea that vital First Amendment freedoms must be sacrificed because publicity "might" in some way "make difficult the impaneling of an impartial jury \* \* \*"<sup>11</sup> is completely repulsive to our constitutional system. Even in contempt cases, this Court has made clear that neither an "inherent tendency" nor a "reasonable tendency" to interfere with the orderly administration of justice is sufficient to justify a restriction on the press. *Bridges v. California*, 314 U.S. 252, 273 (1941). Surely the extreme of a prior restraint on the publication of information revealed in public court proceedings, in public court records, and from other sources about pending judicial proceedings cannot be imposed on the basis of possible contingencies, particularly where

<sup>9</sup> Respondents point to the Nebraska statutory requirement that criminal trials be held within six months of arrest. The subject statute, however, is so riddled with exceptions that it can hardly be said to set forth a requirement at all. Neb. Stat. 29-1207, R.S. Supp. 1974.

<sup>10</sup> Respondents seem to give some weight to the Nebraska statute that limits any change of venue to the immediately surrounding counties. Both *Groppi v. Wisconsin*, *supra*, and *Irvin v. Dowd*, *supra*, 366 U.S. at 720-721, would appear to throw serious doubt upon the constitutionality of that statute. However, we need not press the point for two reasons. First, a state may not use restrictive devices such as a limit on venue to cut off First Amendment rights, and secondly, there were obviously fair and unbiased jurors aplenty among the more than 52,000 inhabitants of the counties surrounding Lincoln County, where the crime occurred.

<sup>11</sup> Stuart Brief at 36, 40. All three briefs of Respondents describe the alleged harmful effects of publicity in this case as "possible," "probable," "potential" or "inherent," with a "high probability of injury," and repeatedly the harmful effects are hedged in terms of what "could" happen, or "can" happen, or "might" happen, or "may" happen. Neb. Brief at 24, 25, 41; Stuart Brief at 42, 43; Simants Brief at 9, 23, 29.

alternative methods of dealing with real problems are present when and if they occur.

If any proof were needed as to the highly speculative nature of assuming bias and prejudice in advance of trial, it is provided by Respondents themselves when they attempt to articulate just what such an assumption need be based upon. For example, Nebraska, apparently in recognition of the hazy state of this record as to just why a prior restraint was necessary, concludes that "\* \* \* the trial judge is not limited in making his determination to the introduction of evidence that shows the existence of a 'clear and present danger' but may consider other indices of which he is aware." Neb. Brief at 40. Under this theory, the trial judge could consider anything he pleased, inside or outside the record, in order to reach some entirely conclusory finding that would restrain publication.

And the State goes on:

Of necessity, the record contains language couched in speculation. No one can determine to a certainty the potential impact of actual pre-trial publicity. However, when pre-trial publicity creates a high probability of injury to Sixth Amendment rights a restrictive order is warranted. [*Id.* at 41 n.25.]

In his Brief, Judge Stuart argues that even though information "is available to the public," it should not be *disseminated* to the public because of its possible adverse impact. Stuart Brief at 33. He then notes that "\* \* \* honest and factual reporting by sincere and responsible news services can similarly, though unintendedly, cause identical results [as sensational and bizzare reporting], thus frustrating the criminal process." *Id.* at 41. After attempting to distinguish between cases involving "allegations of public corruption" from



those involving crimes of "a private citizen" (*id.* at 37)—an endeavor that we can hardly envisage the federal and state courts entering upon—Judge Stuart concludes that, " \* \* \* based on the unique circumstances presented by the record, the nature of the crime, and the community setting surrounding the prosecution, there is no question but that unrestricted pretrial publicity presented an obvious threat to the integrity of the trial." *Id.* at 43. Just what "unique circumstances" are presented by this record is unclear, and how "the community setting surrounding the prosecution" could justify a prior restraint is unexplained.

As for Simants, he takes the extraordinary position that:

[e]ven without evidence before it [it] would appear from *Sheppard v. Maxwell*, *supra*, that the court has a duty to take action once it has been brought to its attention that adverse publicity might, in fact, impair the right of the defendant to secure a fair trial. [Simants Brief at 23.]

Here again, the theme reappears that based not upon evidence and findings but upon the mere possibility of adverse publicity, a trial judge can take a step directly limiting press coverage of court proceedings, never before approved by this Court. We emphasize these quoted portions of Respondents' briefs not to show how weak this record is but rather to demonstrate that in *all* prior restraint cases the courts are entering orders on the basis of speculation, theory and surmise. Respondents here cannot adequately articulate what could possibly justify the drastic departure from First Amendment guarantees represented by the Nebraska prior restraint orders because such justification does not exist. With unsupported claims of vague "unique circumstances," "community setting," and "nature

of the crime" used as legal standards, there would be virtually no limit on the judicial power to issue prior restraints. These broad and expandable criteria would soon smother the press exercise of its First Amendment rights, all to the detriment of the public. Just as importantly, even if adverse pretrial publicity could somehow be quantified, assessed and proven, we have shown both in our main brief and in this one that adequate measures are available to the courts to prevent injury at trial.

2. Judge Stuart is simply wrong in asserting that *United States v. Schiavo*, 504 F.2d 1 (3d Cir. 1974), and *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), held that a prior restraint is permissible "if some type of notice of hearing preceded the order." Stuart Brief at 29. In fact, *Schiavo* did not decide the issue as to whether such restraints are permissible,<sup>12</sup> and *Dickinson*, insofar as reporting on the open court proceedings involved in that case was concerned, held that no censorship or prior restraint whatever was permissible.<sup>13</sup> Again at page 35 of his brief, Judge Stuart misapprehends the *Dickinson* ruling. That case was not restricted to the publication of information about corrupt officials. As noted above, its ruling re-

<sup>12</sup> The *Schiavo* court specifically stated: "Our conclusion that this case should be reversed on procedural grounds makes resolution of the constitutional issue unnecessary." 504 F.2d at 6.

<sup>13</sup> The Fifth Circuit said: "Censorship in any form—judicial censorship included—is simply incompatible with the dictates of the constitution and the concept of a free press. \* \* \* [N]o decision, opinion, report or other authoritative proposal has ever sanctioned by holding, hint, dictum, recommendation or otherwise any judicial prohibition of the right of the press to publish accurately reports of proceedings which transpire in open court." 465 F.2d at 506-507; footnotes deleted.

lated to any type of court proceeding involving any type of subject matter.

3. Both the State of Nebraska and Judge Stuart rely heavily in their briefs<sup>14</sup> upon an informal, post-trial questioning of jurors apparently undertaken by the trial judge. The questions and answers relied upon should be completely ignored by the Court for each of three distinct reasons:

(a) They are not a part of the record.<sup>15</sup>

(b) Even if they were part of the record, the questions posed to the jurors are so leading or confusing that the answers elicited are meaningless. The first question was not quoted in either brief but appears to have asked whether the jurors could have been fair and impartial if they had heard, as the State puts it, "that the defendant confessed to his father and mother, his nephew, the State Patrol investigator and the Sheriff." Neb. Brief at 8. A question so phrased would clearly indicate the answer the judge was seeking. The second question, as quoted by the State, asked the jurors, "how many of you could not have acted as jurors in the case" if they had heard about "the confessions" before trial. The nine jurors who raised

<sup>14</sup> Neb. Brief at 7-8, 26-27; Stuart Brief at 50-51.

<sup>15</sup> In our Brief, Petitioners brought the Court up to date on certain matters occurring in the case after the grant of certiorari (pp. 18-21). We were careful to point out, however, that we were doing so "for informational purposes only" (p. 18); we in no way relied upon such matters as grounds for decision in the case. Respondents, on the other hand, are substantively relying upon matters wholly outside the record in support of an affirmance of the judgment below.

We would point out in addition that most of the facts stated on pages 3 through 6 of the State's Brief are *de hors* the record, and many of them are simply inaccurate.

their hands may well have felt that such knowledge would have legally disqualified them from acting as jurors. The third and fourth questions asked how many jurors "would have been able to take an oath" that they could be fair and impartial if they had read "the text of the confession" before trial. This question was entirely unfair, since the jurors might well have felt perfectly able to be fair and impartial and yet not have wanted for a variety of reasons to take an oath on it.

(c) There was no opportunity for counsel to test or probe these answers; they were elicited solely by the court. This is particularly important because, as noted, the tenor and cast of the questions revealed the answers the judge was seeking.<sup>16</sup>

If the Court intends to rely in any way upon these questions and answers, then Petitioners respectfully request leave of Court to file the results of a subsequent poll of the jurors conducted by the North Platte Telegraph which completely refute the notion that the jury felt it would have been prejudiced in its ability to decide the case impartially because of items in the media in advance of trial.

4. The State refers to the order in this case as a "momentary and narrow restriction" (State Brief at 22), as one "narrowly and momentarily" circumscribing the reporting of news (*id.* at 13), as a "limited restrictive order" (*id.* at 32), and as one entered "for

<sup>16</sup> We find it curious that the State and Judge Stuart rely so heavily upon the jurors' answers to the judge's informal questions at the conclusion of this case and yet both Respondents totally discount the value of jurors' answers to a more formal and detailed voir dire procedure at the outset of trials in general. Neb. Brief at 32; Stuart Brief at 22-24.

a relatively short period of time and \* \* \* narrow and limited in scope" (*id.* at 39). Judge Stuart similarly refers to "a temporary delay" in publicity. Stuart Brief at 5. We would point out that the prior restraints in this case first went into effect on October 22, 1975, and remained in effect in one form or another until the jury was finally selected on January 7, 1976—a period of 11 weeks.<sup>17</sup> This was a constitutionally impermissible period under any conceivable standard.

As to the "narrow" nature of the order appealed from, it prohibited the revelation not only of confessions and "admissions against interest" but of "[o]ther information strongly implicative of the accused as the perpetrator of the slayings." Cert A 63a-64a. As we have previously pointed out, this language is so broad and so vague that it could encompass Simants' arrest, the fact that a complaint was filed against him, his retaining a criminal lawyer, his plea of not guilty by reason of insanity, and an entire range of other, purely factual and accurate information. The breadth of the order is in line with the conclusion of the State's brief, because after repeated language in that brief about using prior restraints when all else fails, the final articulation states (Neb. Brief at 41): "when pretrial publicity creates a high probability of

<sup>17</sup> Nor is such a delay unusual. As pointed out by one of the amici, it took 40 days to have the following, obviously unconstitutional order stayed by an appellate court:

IT IS THEREFORE ORDERED AND DECREED that no person, firm, or corporation shall in any manner, by radio, newspaper, television, or otherwise, publicize, report or distribute any information whatsoever concerning the evidence, witnesses, trial or proceedings in this cause without a specific order authorizing said reporting or publication from the Court. [*North Carolina v. Purdie*, Nos. 75 CR 9298, 9299 (Gen. Ct. of Justice, Super. Ct. Div., Columbus County, N.C., Jan. 5, 1976).]

injury to Sixth Amendment rights, a restrictive order is warranted."

5. Simants makes an important point in his brief when he states (p. 10) that in Sutherland, where the crime occurred, the population is only about 800, that news is rapidly disseminated by word of mouth, and that information "is more rapidly and readily conveyed by word of mouth and gossip than it would be in a large metropolitan area or populous area." This was precisely the point that an attorney for the media was making in a sentence referred to in two of Respondents' briefs (Stuart Brief at 40; Neb. Brief at 35). He was not saying, as these reference imply, that media publicity had already made it impossible for Simants to receive a fair trial but rather that gossip and word of mouth communication had already transmitted virtually all relevant information to everyone in the community. The point is important because rumors and gossip can transmit an astonishing amount of misinformation—misinformation that can be far more damaging to a defendant than accurate news reporting. Friendly and Goldfarb, *Crime and Publicity* 79 (1967); Allport and Postman, *The Psychology of Rumor* 15 (1947). And as we noted in our main brief (pp. 59-60 n.48), such rumors and gossip tend to increase and flourish when news is cut off from the people. Thus, Simants' point supports, rather than undercuts, the value of free and open reporting of news rather than a restraint on its publication.

6. It is simply not true, as Respondents imply, particularly by comparisons between this case and *Sheppard*, that the news coverage here was excessive, erroneous or sensational. Even the Nebraska Supreme Court conceded (Cert A 62a) that the press in this case fol-



lowed the voluntary "Nebraska Bar—Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation," which appear at Cert A 4a. As the Exhibits in the Joint Appendix indicate (and these can be supplemented in the record by many other newspaper and magazine articles if the Court so wishes), the facts of the Simants story were moved off the front pages in the out-of-town papers after the initial two or three days of intense press and public interest, and the story would have remained routine if it had not been for the prior restraint orders. The local newspaper, the North Platte Telegraph, naturally gave the story more attention than the press from further away, but after the second day the Telegraph gave far more attention to the maneuvering over the prior restraint orders than to the crime itself. To the extent that this case has received publicity "exceeding the normal bounds of reporting" (Simants Brief at 18), it is almost entirely due to the prior restraint orders now before the Court. Thus, in a very real sense, much of the publicity was caused by acts of the judiciary rather than by the nature of the crime.

7. In conclusion, we would emphasize that Respondents, despite their assurances to the contrary, do not seek an accommodation between fair trial and free press rights. An "accommodation" has in fact been in existence for 200 years. While the impact of the media has obviously increased in recent years, so have the rights of defendants, which have been protected by ever more procedural and substantive safeguards. So, as well, has the willingness of the media to abide by voluntary guidelines such as those in existence in Nebraska. What the rule of law sought by the Re-

spondents really would effect is not an accommodation but virtually an automatic elimination of free press guarantees when confronted with even an alleged possibility of damage to a defendant—despite all the protective devices we have shown to be at the disposal of the court in ensuring that defendant a fair trial.

Surely it is self-evident that if this Court were ever to approve the type of prior restraint under review, several developments would immediately occur. First, defense attorneys would begin seeking prior restraint orders as a matter of course, both in order to screen their clients from any publicity at all and in order to protect themselves from a charge of ineffective assistance of counsel. Secondly, prosecutors would virtually never oppose such requests, since publicity would not necessarily help their cases and it would be far safer for them to concur in such requests than to risk later reversals on grounds of prejudicial publicity. And finally the lower courts, faced with no opposition from the immediate parties, could easily discern some "evidence" of possible prejudice to the defendant—as demonstrated by this case—and would begin routinely issuing prior restraint orders and their blood relatives, orders closing courts.

If this Court were to attempt to articulate *any* type of standard whereby confessions and other types of information about pending cases could be suppressed, the varying interpretations and applications of that standard in the flood of prior restraint orders that would follow obviously would result in a concomitant flood of cases attacking those orders.<sup>18</sup> Appellate re-

<sup>18</sup> The complexity of these orders—even relatively brief ones—is illustrated by the County Court's order in this case. If that order had remained in effect, and Simants were to serve a life sentence,

view must be immediate, or the right is lost before the judicial error can be remedied—and there is authority to the effect that the press must obey even the most outrageously unconstitutional order until it is reversed on appeal. *United States v. Dickinson, supra*. (The assumption in that case being, however, that such an appeal would be immediately provided.) Suppose appellate courts would not or could not act immediately—just as the Nebraska Supreme Court refused to act expeditiously in this case. Is this Court prepared to give federal District Courts the power to step in and void illegal state orders? And as to both state and federal orders, we question the wisdom or even the possibility of this Court itself undertaking the task of invalidating a series of improper prior restraint orders.

Thus, if this Court approves the type of order under review, one of the most unique, honored and vital aspects of the American system—the right of the press rather than Government to decide what news the American people will receive—would have disappeared. And ironically, it will have disappeared just at that moment in history when events not only in this country but throughout the world are demonstrating that the First Amendment should be strengthened—for the protection of us all—rather than eroded away.

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a copy of the preliminary hearing would never be made public until his death. The court ruled that a copy of the preliminary hearing would be made available to the public "at the expiration of this order" (Cert A 3a), and the order was to remain in effect "until modified or rescinded by a higher court or until the defendant is ordered released from these charges." *Id.*

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.  
HOGAN & HARTSON  
815 Connecticut Avenue, N.W.  
Washington, D.C. 20006

JAMES L. KOLEY  
STEPHEN T. MCGILL  
MCGILL, KOLEY & PARSONAGE, P.C.  
Suite 300  
10010 Regency Circle  
Omaha, Nebraska 68114

*Attorneys for Petitioners*

Supreme Court, U. S.

FILED

JAN 26 1976

MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1975

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No. 75-817

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NEBRASKA PRESS ASSOCIATION, et al.,  
*Petitioners,*

v.

THE HONORABLE HUGH STUART,  
JUDGE DISTRICT COURT IN AND FOR  
LINCOLN COUNTY, NEBRASKA, et al.,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF NEBRASKA

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Brief of  
**THE REPORTERS COMMITTEE FOR FREEDOM  
OF THE PRESS LEGAL DEFENSE AND  
RESEARCH FUND As Amicus Curiae**

---

LAWRENCE SPEISER  
1225 19th Street, N.W.  
Washington, D.C. 20036

*Attorney for The*  
Reporters Committee  
For Freedom Of The Press  
Legal Defense and Research  
Fund, *Amicus Curiae*



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In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1975  
NO. 75-817

\_\_\_\_\_  
NEBRASKA PRESS ASSOCIATION, et al.,  
  
Petitioners,  
  
v.  
  
THE HONORABLE HUGH STUART, JUDGE, DISTRICT  
COURT IN AND FOR LINCOLN COUNTY,  
NEBRASKA, et al.,  
  
Respondents.

\_\_\_\_\_  
ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF NEBRASKA

\_\_\_\_\_  
Brief of  
THE REPORTERS COMMITTEE FOR FREEDOM  
OF THE PRESS LEGAL DEFENSE AND  
RESEARCH FUND As Amicus Curiae  
\_\_\_\_\_

Opinions Below

The opinions of the County Court of Lin-  
coln County, Nebraska, dated October 22,  
1975, are set forth at Cert. App. 1a and

9a.1/ The per curiam statement of the Nebraska Supreme Court, issued on November 10, 1975, is set forth at Cert. App. 19a. The opinion of Mr. Justice Blackmun, dated November 13, 1975, is set forth at Cert. App. 21a. The Order of the Nebraska Supreme Court for Hearing and Order to Show Cause entered on November 18, 1975, is set forth at Cert. App. 29a. The opinion of Mr. Justice Blackmun, dated November 20, 1975, is set forth at Cert. App. 35a. The majority concurring and dissenting opinions of the Nebraska Supreme Court dated December 1, 1975, are set forth at Cert. App. 44a and are reported at 63 Neb. S.C.J. 782, N.W.2d \_\_\_\_\_. The Orders of this Court, dated December 8, 1975, and December 12, 1975, inter alia, granting the motion for petitioners to treat papers previously filed by them with this Court as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska and granting said Petition are set forth at Cert. App. 70a and 71a. Except as indicated above, none of said opinions is thus far reported.

#### Jurisdiction

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (3).

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1/ All references to prior opinions in this brief are to the appropriate pages of the Appendix to the amended petition for certiorari.

#### Consent of the Parties

All parties to this litigation by their attorneys, have consented to the filing of this brief.

#### Questions Presented

1. Whether, consistent with the First and Fourteenth Amendments to the United States Constitution, an injunction may issue prohibiting publication by the press of information obtained from public court proceedings, from public court records, and from other sources about pending judicial proceedings involving an adult.

2. Whether this Court should address itself in any way to that portion of the Nebraska Supreme Court decision giving a trial judge discretion to seal all pretrial proceedings he believes may elicit information "likely" to prejudice the defendant's ability to obtain an impartial jury when that issue was neither briefed nor argued in the courts below.

#### Constitutional Provisions Involved

The First Amendment to the United States Constitution provides in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech or of the press . . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed . . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

#### Interest of Amicus

The interest of the Amicus, The Reporters Committee for Freedom of the Press (Legal Research and Defense Fund) <sup>2/</sup> in the question of the constitutionality of restrictive orders is well-known to this Court, Amicus having filed a brief Amicus Curiae in this case on November 5, 1975, in support of Petitioners' Application for

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2/ Members of the Steering Committee of The Reporters Committee for Freedom of the Press are: Elsie Carper of The Washington Post, Lyle Denniston of The Washington Star, Fred P. Graham of CBS News, Jack C. Landau of the Newhouse Newspapers, Robert C. Maynard of The Washington Post, Jack Nelson of the Los Angeles Times, Eileen Shanahan of The New York Times, Howard K. Smith of ABC News, Kenneth Auchincloss of Newsweek, Walter Cronkite of CBS News, John Kifner of The New York Times, John Wood of The Boston Globe, Joel Weisman of The Washington Post-Chicago Public News Center, Grace L. Mastalli of the College Press Service, Gene Miller of The Miami Herald, and Wilson F. Minor of the New Orleans Times-Picayune. (Press affiliation for identification purposes only.)

a Stay, No. A-426, stay denied, December 12, 1975, Cert. App. 71a, <sup>3/</sup> and Amicus having appeared previously before this Court in United States v. Dickinson, cert. denied, 414 U.S. 979 (1973); Rosato v. Superior Court, No. 75-919 (pending on petition for a writ of certiorari); News-papers, Inc. v. Blackwell, stay denied, 421 U.S. 997 (1975); Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (1974) (application for stay granted); and Times-Picayune Publishing Corp. v. Schulingkamp, 420 U.S. 985 (1975) (dismissed as moot).

News reporters and editors, in their representative capacities as employees of news organizations and in their individual capacities as professional journalists, believe that the order in this case imposes impermissible limitations on their rights and obligations to gather and publish information about the criminal justice system, and will, if affirmed by this Court, start the nation's trial judges down the legal road toward a secret court system.

Amicus submits that this order directly and adversely interferes with the working news reporters and editors who, in most instances, are the link between information and comment about the court system on the one hand and the average citizen on the other. Few citizens can come to a courthouse to view public records or attend public proceedings. They depend upon the

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3/ In that brief and a Supplemental Brief filed on November 12, 1975, Amicus addressed primarily the question of the jurisdiction of this Court or a Justice of this Court to grant a stay of the District Court's restrictive order, a question no longer presented for decision.



press to report and analyze court cases, an obligation which the press today is taking more seriously than ever before.

Newspapers, news magazines, television, radio and other media increasingly are assigning reporters -- many of them with legal training -- to specialize in reporting on judicial proceedings. Bar associations are conducting seminars, and their members are attending classes, to learn how to help the press bring information about the court system to the public. The gag order in this case, if upheld, will reverse this trend toward more and better judicial reporting and will encourage similar secret proceedings in other states.

#### Summary of Facts

With respect to a public pretrial proceeding involving charges against a suspect accused of murdering six persons in Sutherland, Nebraska, the Nebraska Supreme Court ruled that the trial court judge could restrain the "news media" from the publication or republication of:

"[T]he existence or content of . . .

(1) Confessions or admissions against interest made by the accused to law enforcement officials . . . .

(2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media.

(3) Other information strongly implicative of the accused as the perpetrator of the slayings."

Cert. App. 64a.

The Supreme Court of Nebraska order therefore applies to information obtained from open-court proceedings, from open-court and other public records and from other informational sources, including persons who may in no way be under the jurisdiction of the trial court or even of the courts of Nebraska.

The Supreme Court of Nebraska, without hearing argument on the question, also authorized the trial judge to seal any pretrial proceedings which might produce evidence inadmissible at the trial and would therefore be "likely to interfere" with the defendant's right to obtain an impartial jury.

#### Statement Of The Case

The facts and prior decisions in this case are detailed in the briefs of the parties; Amicus Curiae will address itself to certain aspects of this case that are particularly relevant to the arguments to be made herein.

Sometime on October 18, 1975, six members of the Henry Kellie family of Sutherland, Nebraska, were brutally killed in their home. Less than three months later, Erwin Charles Simants, a resident of Sutherland and a Respondent here, was convicted on six counts of first degree murder by a jury chosen from the jurisdiction within which the killings had occurred. <sup>4/</sup> During the time between the deaths of the Kellies and the conviction

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<sup>4/</sup> These facts are taken from Brief of Petitioners at 18-21, supplementing the facts of record that occurred prior to this Court's grant of a writ of certiorari.

of Respondent Simants, Petitioners were subjected to direct prior restraints of varying degrees and forms on the reporting of these crimes and their attendant judicial proceedings that, simply put, were almost unprecedented in American jurisprudence. Whether these direct prior restraints were valid under the First Amendment is, of course, now the question before this Court, but Amicus takes the position that, in deciding this question, this Court should pay particular attention to certain aspects of this case that Amicus thinks deserve special emphasis.

Shortly after the killings occurred, word of these mass slayings spread quickly throughout the small community of Sutherland. The initial reaction of this community, as reported by the press including some of Petitioners here, was one of great distress and fear. Rumors that a sniper was on the loose in the community apparently spread by word of mouth and kept this small community in a state of fear for a substantial period of time, apparently causing many residents of the community, on the advice of law enforcement officials, to retreat within their homes, locking their doors in hopes of preventing similar occurrences. Reports of prowlers were made to police, and police set up roadblocks around Sutherland, searching each car for the murderer. 5/

Shortly after the killings, Respondent Simants made statements concerning his complicity in them to several relatives. At no point in this case has it ever been suggested that the admission of such statements in the trial of Simants could have

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5/ Joint Appendix at 83-84, 88, 89, 92, 96, 97 (hereinafter cited as J.A.).

been proscribed under the Federal Constitution. Amos Simants, the father of Respondent Simants, having been told of the killings, repeated the details, including his son's complicity to a resident of Sutherland who in turn gave this information to the media. 6/ The media, exercising its editorial prerogative and responsibility in a community shaken by these heinous crimes, reported accurately and fully the substance of Simants' statements in the context of their coverage of the crimes and Simants' arrest for these crimes on October 19, 1975. From that date until the restrictive order of the County Court went into effect on October 21, reporting of these crimes and Simants' subsequent arrest consisted, insofar as the record in this case shows, of straight reporting.

During this period, the press reported fully and accurately that the Court Attorney, a Respondent here, had stated to the media that he had a "theory" which would perhaps explain the motive for the killings and that this "theory" would perhaps be borne out in an autopsy report. J.A. 85, 88. 7/ Also during this period prior to the preliminary hearing Respondent Simants was arraigned in a proceeding partially closed to the press and public at the request of the County Attorney and apparently over the objection of Simants' own counsel. J.A. 7.

By the time the preliminary hearing was held on October 22, the rumors concerning

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7/ The source of this information was apparently the County Attorney. The Lincoln County Sheriff was quoted in several articles in which he gave information that Simants had given to him. See J.A. 83, 89.



a sniper and the fears of the Sutherland community had been eliminated or allayed at least in part, if not completely, by the media coverage of the case. At that hearing, described in detail by the Petitioners in their brief, the Lincoln County Sheriff testified that he had taken two "statements" from Simants, one of which was subsequently described in that hearing by Simants' own counsel as a "confession." J.A. 16.

From the time the County Court entered its order, dated October 22, 1975, until the petit jury selected to try Respondent Simants had been impaneled on January 8, 1976, Petitioners scrupulously obeyed the successive orders and modifications thereto of the District Court, Mr. Justice Blackmun, and finally the Supreme Court of Nebraska. From October 22 until January 8, citizens of Sutherland and the surrounding area, indeed all the citizens of Nebraska who had not actually been in attendance at the preliminary hearing, who desired more information on the case -- including information related to the performance of their duly elected public officials in the matter -- had either to go to the courthouse and peruse documents on file there, read truncated versions of the facts of the case as reported by national media not bound by any of the existing orders, 8/ or after December 1, 1975, read or listen to information disseminated by any Nebraska media other than Petitioner themselves. 9/

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8/ See, e.g., Newsweek, Dec. 8, 1975, at 87.

9/ Under the terms of the Nebraska Supreme Court's decision, all media other than Petitioners were free from the strictures of the various orders.

Yet, as Petitioners have noted, a jury was impaneled without extraordinary effort after Simants' motion for a change of venue was denied.

## ARGUMENT

### Introduction

The Reporters Committee for Freedom of the Press submits this brief Amicus Curiae in support of Petitioners, Nebraska Press Association, et al., challenging the validity of a pre-publication injunction barring the press in Nebraska from publishing news of general information about a pending adult criminal proceeding.

This Committee was the only Amicus Curiae which entered this case while it was pending before Mr. Justice Blackmun because it believed then -- as it believes now -- that this Court has both a constitutional and public policy obligation to the citizens of this nation to resolve the growing legal confusion and institutional hostility between the press and the courts which has developed in the decade since this Court's decision in Sheppard v. Maxwell, 384 U.S. 333 (1966).

What has developed in this case is symptomatic of fair trial-free press litigation all over the nation:

\*The judiciary -- as represented by a local county trial judge, then the Nebraska Supreme Court and then a Justice of this Court -- has arrogated to itself the sole power to decide when, and under what circumstances, the public is to be informed about the operation of the criminal courts even though it is mandated by the First Amendment that the press, and not the



courts, is free to decide whether information about the adult criminal justice process should be published or not.

\*The judiciary has arrogated to itself, by the long delays in both this Court and the Nebraska Supreme Court, the sole power to decide when information about the courts may be published by the simple expedient of continuing since October 22 a prior restraint order based on sheer speculation as to the potential danger of news, an action which is under all the decisions of this Court presumptively invalid on its face.

\*The judiciary has arrogated to itself, by that section of the Nebraska Supreme Court decision authorizing the wholesale sealing of pretrial proceedings, the right to exclude the public and press from crucial stages of the criminal justice process when this issue was not argued or briefed in the trial court or in the Nebraska Supreme Court; and has authorized these secret court proceedings on the vague indefinable standard that information from these proceedings is "likely" to interfere with the ability to select an impartial jury.

The trust and confidence that the public of this nation has in its court system primarily stems from the historical fact that, as opposed to the secrecy prevalent in the executive and legislative branches of government, the courts have always been open to the public -- unafraid to subject their actions to the most intense public scrutiny and inspection.

The Nebraska Press Association case to date stands for the principle that the judiciary is about to embark on the very type of secrecy which so frequently has been responsible for corruption in other

branches of government and the undermining of public confidence in their integrity.

We beg this Court to consider the damage that will ensue should it affirm the Nebraska Supreme Court decision and unalterably set the press of this nation against the judiciary with all the attendant constitutional and political evils for both institutions that will surely result from this type of confrontation, a confrontation that is unprecedented historically, unwise politically and unjustified constitutionally.

If this Court in any way encourages the thousands of politically appointed or politically elected trial judges in the nation to suppress information about the courts -- either by direct prior restraints or by secret proceedings -- it will not have arranged a balance between the First Amendment and the Sixth. It will have extinguished the First Amendment in relation to news of the judiciary and will have informed the judiciary that it can avoid its obligations to suffer the discomfort of public inquiry.

Indeed, this Court is itself the model. With rare exceptions, every proceeding and document of this Court are open matters of public record for all to hear and see and for all to subject to the robust debate of a free society.

While there are those who may disagree with the decisions of this Court, there are few, if any, who can challenge its reputation for the highest integrity and trust, a trust built on the firm foundation of truth and openness; a trust which should, by decision of this Court, under the Constitution be the rule, and not the exception, for the inferior courts of the land.

I.

IT IS A VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FOR AN INJUNCTION TO ISSUE PROHIBITING PUBLICATION BY THE PRESS OF INFORMATION OBTAINED FROM PUBLIC COURT PROCEEDINGS, FROM PUBLIC COURT RECORDS, AND FROM OTHER SOURCES ABOUT PENDING JUDICIAL PROCEEDINGS INVOLVING AN ADULT

- A. This Court should re-examine the underlying assumption of Sheppard v. Maxwell, 384 U.S. 333 (1966), because recent history and cases before this Court and other courts involving Watergate, My Lai and other highly publicized trials show that jurors can reach impartial verdicts in cases surrounded by massive pretrial publicity.

When this Court decided Sheppard v. Maxwell, its decision rested in part on an untested assumption -- which appeared reasonable at that time -- that trial judges, months before the jury selection process, could accurately predict that certain types of news about a criminal case would result in irreparable injury to the defendant's Sixth Amendment rights to a fair trial by making it impossible to obtain an impartial jury.

Based on that assumption, this Court in Sheppard appeared to approve of court rules limiting access by the press to parties, witnesses, attorneys and prosecutors; and indirectly suggested that penalties might be available against "recalcitrant" news reporters and news organizations which published prejudicial information.

We now would appear to have overwhelming factual evidence that the assumption of

Sheppard has been contradicted by recent history and the rulings of this Court -- that, in fact, it is possible to inundate a community with publicity about a case and yet find a fair jury panel. For example, surrounded by the most massive pretrial publicity imaginable:

\* A jury in New York acquitted former Attorney General John N. Mitchell and former Secretary of Commerce Maurice Stans. United States v. Mitchell, CR. 73-439 (S.D. N.Y. 1974).

\* A jury in the District of Columbia convicted Watergate burglar E. Gordon Liddy. The United States Court of Appeals for the District of Columbia affirmed that conviction and this Court denied Mr. Liddy's petition for certiorari which claimed that publicity had made it impossible to select an impartial jury. Liddy v. United States, 420 U.S. 911 (1975).

\* A jury in the District of Columbia convicted former White House aide Dwight Chapin. The United States Court of Appeals for the District of Columbia affirmed Mr. Chapin's conviction, and this Court denied Mr. Chapin's petition for certiorari arguing that pretrial publicity had made the selection of a fair jury impossible. Chapin v. United States, No. 75-401, 44 U.S.L.W. 3344 (U.S. Dec. 3, 1975).

\* A jury in the District of Columbia acquitted former Governor John Connally. United States v. Connally, CR. 74-440 (D. D.C. Apr. 18, 1975).

\* A court martial convicted Lieutenant William Calley. A United States District Court reversed the conviction on a finding that publicity had made it impossible to obtain a fair jury panel. The United



States Court of Appeals for the Fifth Circuit reversed en banc and found that Lieutenant Calley had received a fair trial. Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975).

\* This Court, in Murphy v. Florida, 421 U.S. 794 (1975), found that specific knowledge by members of a jury about a defendant's prior criminal background was not enough to show that the jury was not impartial in deciding the case.

\* Other examples of massive publicity adverse to the defendants -- perhaps not of the intensity and scope of Watergate and My Lai -- have resulted in acquittals for Angela Davis, Bobby Seale, and the Gainesville Eight.

Amicus doubts that this Court could, as a general rule, posit any present situation in this case or any future situations in other cases which could result in more adverse publicity than was generated by Watergate, surrounded as it was by publicly televised proceedings before the Senate in a non-adversary setting, or by the My Lai incident.

Amicus believes that trials involving Watergate, My Lai, Angela Davis, John Mitchell, Lieutenant Calley, and this Court's decision in Murphy v. Florida clearly affirm the traditional faith we have in our jury system -- that once a juror takes his oath, to judge a case only on the evidence produced in the courtroom, he is able to serve impartially and he disregards previous news reports prejudicial to either the defense or the prosecution.

The Nebraska Supreme Court decision -- and Mr. Justice Blackmun's decision in this case -- stand for the proposition that

jurors are not to be trusted to carry out their duties in the fair manner in which juries in this nation have operated for the past 200 years.

Amicus fails to see how in any given case -- whether it be Watergate or the Nebraska trial at issue in this case -- this Court can decide that a trial judge, before the jury selection, can accurately determine that the selection of a fair jury will be impossible because of news reports, and therefore the trial judge must be given broad powers to extinguish the rights of an independent and free press to bring the public news reports about the case.

Amicus does concede that there are rare instances -- in the more than one million felony cases tried every year in this nation -- where, in fact, news accounts have made it impossible to obtain a fair jury in a locality. See Rideau v. Louisiana, 373 U.S. 723 (1963).

But as opposed to the irreparable injury which the press and the public suffer from a ban on gathering and publishing news about a criminal case, there is no irreparable injury to the defendant. He may ask for a delay and for a change of venue. His ultimate remedy is, and has traditionally been, to obtain a mistrial and then a new trial, a remedy that has been frequently ordered by this Court for numerous types of trial errors without any suggestion that an occasional mistrial will cause a clear and present danger to the administration of justice.



B. The order before this Court violates the First Amendment because it is overbroad and vague; and because the supervision of such vague orders imposes impossible burdens on federal and state appellate courts, while subjecting the press to unconstitutional censorship pending appeals.

The issue before this Court, lifted from the complex background of the case, is the constitutionality of the opinion and judgment of the Supreme Court of Nebraska that authorized a direct prior restraint on the reporting, "the existence or content of . . . (1) Confessions or admissions against interest . . . (2) . . . excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings," Cert. App. 64a, and the holding of the Nebraska Supreme Court that the trial judge, in his sole discretion, may close any pretrial proceedings when he believes that inadmissible information from these proceedings may make it "likely" that an impartial jury cannot be impaneled.

At the outset, Amicus would point out that the category of information -- "implicative of the accused" or "likely" to deprive him of a fair trial -- identified by the Supreme Court of Nebraska will not be addressed at length here for the reason that these categories are incapable of meaningful definition and are clearly unconstitutional under the First and Fourteenth Amendments if those concepts continue to have a place in the jurisprudence of this Court. See Smith v. Goguen, 415 U.S. 566 (Powell, J.) and 583 (White, J., concurring) (1974). To the extent that these categories might be thought to encompass specific types of

information such as prior criminal records, (see the Chambers opinion of Mr. Justice Blackmun, Cert. App. 41a), it can only be observed that, should this Court conclude that prior restraints as to confessions are invalid, then it would follow a fortiori that no prior restraints on other types of information could be thought constitutional.

As Petitioners in their brief in this case have forcefully argued, the precedents of this Court and other federal and state courts in no way support and in fact cut squarely against the proposition that the First Amendment tolerates the direct judicial restraint on news related to criminal judicial proceedings that has existed, in one form or another, since October 21, 1975, in this case. Nor, as Petitioners point out, Brief for Petitioners at 41-44, do any of the studies of the broad concerns from which this case evolved recommend the imposition of direct restraints on the press. Yet without so much as a suggestion as to why our constitutional experience of two centuries must suddenly be discarded, two state trial judges, five judges of the highest court of the State of Nebraska and a Justice of this Court have concluded that the past is no longer a sufficient guide and that we must start off down a new road that has consistently been eschewed by this Court in every case before it dealing with this question since Patterson v. Colorado, 205 U.S. 454 (1907).

Before starting down that road, Amicus would most respectfully suggest that this Court seriously consider the pitfalls that most certainly mark this uncharted path. If this Court is to case aside the principle that the press is both free to report and responsible for the reporting of open court proceedings and records before the ink is dry on Cox Broadcasting Corp. v.

Cohn, 420 U.S. 469 (1975), this Court should be aware that it would be rejecting a principle that has heretofore gone unchallenged in our constitutional history. And before this Court starts down the slippery slope of granting a license to every one of thousands of trial courts to enter prior restraints against the press in cases in which fact patterns are as varied as the number of cases themselves, this Court should be aware that the appellate capacity of this Court as well as lower federal and state courts does not exist to control, without grave and irreparable damage to the First Amendment interests involved, the exercise of such an unprecedented power by those trial courts. Amicus believes that, after full consideration of all of the ramifications that would inhere in an affirmance of the decision of the Supreme Court of Nebraska, it will surely reverse that decision.

C. The order of the Nebraska Court violates the First Amendment because it violates the unbroken line of decisions of this Court that the judiciary has no special prerequisite to impose prior restraints on its proceedings and therefore to be free from full public scrutiny and debate.

As Petitioners have argued, Brief for Petitioners at 28, the principle enunciated in Cox, derived from an unbroken chain of cases in this Court, clearly controls the validity of most of the prior restraints imposed by the Supreme Court of Nebraska, and, were the restraints herein applicable only to information that came out in the open court hearing, the judgment before this Court would surely warrant summary reversal. But as the records show there was in this case publicity given to Respondent Simants' extrajudicial statements

as well as the reporting of his having given a "statement" to authorities, that took place prior to the preliminary hearing on October 22. Thus, publication or republication of facts already in the public domain has been subjected to a direct prior restraint, raising the question whether the significant policies underlying the rationale of Cox are of any less force in the context of reporting a crime of the earlier stages of the criminal process that are not brought out in open court.

Two fundamental principles might be thought to constitute the underpinning of Cox. One such principle, derived from Craig v. Harney, 331 U.S. 367 (1947), and reiterated in such cases as Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966), would appear to implicate the values enshrined in the public trial provision of the Sixth Amendment and articulated by Mr. Justice Black in his opinion for the Court in In re Oliver, 333 U.S. 257 (1948). But Cox, while it relied on cases implicating the public trial provisions of the Sixth Amendment, did not cite Oliver or purport to be grounded in the Sixth Amendment. Cox, then, must be said to rest on the principles articulated by Mr. Justice White for the Court:

"[I]n a society in which each individual has but limited time and resources with which to obscure at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without



the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." 420 U.S. at 491-92.

Amicus takes the position that no reasonable distinction can be drawn between the special protection of the First Amendment and this Court's decision in Cox for the reporting of open court proceedings and the reporting of other stages of the administration of criminal justice. In the first place, there are perhaps no areas of governmental operations that are of greater moment and concern to the citizens of this country than the operation of the entire criminal justice system. This is true not only from the viewpoint of the accused, but from the viewpoint of the victim of crime and the citizen who lives in the constant danger and perhaps fear of becoming a victim of crime. Particularly within a system of criminal justice in which only a small percentage of criminal prosecutions, once initiated, ever go to trial, the need for exposure of that process from inception to completion to the light of press reporting is clear and overriding.

The case before this Court is a prime example. Six members of a small community are found brutally murdered, setting off a widespread reaction of the citizenry of fear and concern for their own safety. The need in such a situation for the widest and fullest dissemination of information

concerning whether, and to what extent, the criminal justice system has responded to such an event cannot be subject to serious question. Yet, instead of being permitted to perform this necessary and historic function that they had in fact performed between October 19 and October 21, Petitioners were ordered by a state trial court to abandon that performance at a time when it was uncertain whether it would ever be necessary even to impanel a jury.

That Petitioners were responsibly performing that historic function is evident from even a cursory reading of the articles devoted to the killings that appear in the Joint Appendix filed in this case, J.A. 81-98, articles used to justify the imposition of the prior restraint order by the District Court and the Supreme Court of Nebraska.

Amicus takes the position that the citizens of any community of any size are entitled to have their press report to them all facts related to crime that they need to be assured that their public servants, here law enforcement officials, are adequately performing their jobs. Nor is Amicus' argument limited in scope to the initial wave of publicity, which, incidentally, has never been thought by this Court to present a substantial hazard to fair trials due to the lapse of time normally associated with bringing a case to trial. See Murphy v. Florida, 421 U.S. 794 (1975).

D. The order in this case violates the Sixth Amendment ruling of this Court in Murphy v. Florida that jurors can know adverse information about a defendant and render a fair verdict, and this Court's interpretations of the fair trial provisions of the Sixth Amendment.



If the rejection of the Cox principle as applied to a "confession" or other extrajudicial inculpatory statements is only implicit in the opinions of Mr. Justice Blackmun and the Supreme Court of Nebraska entered in this case, <sup>10/</sup> their rejection of the rationale of this Court's more recent decision in Murphy v. Florida, 421 U.S. 794 (1975), would appear to be even clearer. The facts of Murphy are certainly fresh in this Court's mind and need not be restated here. Suffice it to say that most of the actual petit jurors that sat in judgment of Murphy had prior knowledge of Murphy's extensive prior criminal record, the facts related the crime for which he was being tried, and certain "statements" made by Murphy and his attorneys prior to trial.

This Court, with only Mr. Justice Brennan dissenting, held that Murphy had not been denied a fair trial by impartial jury as guaranteed by the Sixth Amendment. In his Chambers opinion of November 20 in this case, Mr. Justice Blackmun indicated without citation to Murphy that "facts associated with the accused's criminal record," and facts "associated with the circumstances of the accused's arrest" could be enjoined from publication prior to trial. This observation was, at least on the facts as made known to Mr. Justice Blackmun

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<sup>10/</sup> Neither the opinion of Mr. Justice Blackmun of November 20 nor the opinion of the Supreme Court of Nebraska of December 1 would appear to attribute any significance whatsoever to the fact that the prior restraint orders in this case prohibited publication of information most of which came out at an open court hearing.

in the papers before him at that time, dictum, but the observation serves to point up the fundamental flaw that has beset the reasoning of all of the courts below. Amicus believes that flaw to be nothing more nor less than adoption of the position, squarely rejected in Murphy, that the Sixth Amendment guarantees to a defendant in a state criminal proceeding both a fair trial and the appearance of a fair trial. Amicus respectfully submits that the adoption of this position is completely at odds with every other case decided in this Court which has applied the provisions of the Sixth Amendment to the states through the Due Process Clause of the Fourteenth Amendment.

There are two other possible explanations for the opinions below that would serve to avoid the above conclusion. The first would be that the record in this case establishes that the publicity given to the case of Respondent Simants prior to the entry of the restrictive order of the County Court was such as to create that genuine prospect of inability to secure an impartial jury at some future date, whether under the rubric of "clear and present danger" or other tests, that in other contexts have been thought by this Court to be a threshold requirement of imposing a direct prior restraint on the press (assuming arguendo that such a restraint would ever be permissible). As Petitioners have persuasively demonstrated, nothing in this record will support such a finding under any prior understanding of this Court of the substance of "clear and present danger" analysis. Brief for Petitioners at 61-67. The "immediacy" of the danger posed by the publication, a continuing component of

"clear and present danger" analysis, 11/ has simply never been established in this case.

But, and perhaps more importantly, the decisions and opinions written in this case up to the present evince what Amicus feels is a fundamental misconception of the nature of the "danger" that must be present if a prior restraint is even arguably consistent with the First Amendment. The Supreme Court of Nebraska advanced two and only two "dangers" that were thought by it to satisfy the rigors of the "clear and present danger" test which it assumed to be applicable to the imposition of a prior restraint on publication.

The first danger was identified as the possibility that an accused, having actually committed a crime, would be set free because of subsequent reversal of his conviction due to prejudicial pretrial publicity; the "danger" or irreparable harm to society in that case was said to be society's loss of its right to obtain a valid conviction of a guilty person. The second "danger" identified by the Supreme Court of Nebraska is that an accused who is in fact innocent of charges will be wrongly convicted and forced to forfeit his liberty for that period of time it takes appellate or federal habeas courts to right the wrong.

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11/ In New York Times Co. v. United States, 403 U.S. 713 (1971), the Solicitor General argued to this Court that immediacy of the danger posed to society by publication was no longer a component of the analysis of prior restraints; that argument was decisively rejected in the judgment of this Court in that case.

Cert. App. 62a. As Amicus points out, infra n. 16, the former "danger" is, in our jurisprudence, a hypothetical case, and the latter "danger" involves a wrong, however, irreparable, that is a price our society frequently incurs in return for maintenance of an orderly system of justice.

But, even assuming that some cases could be found in which society had lost its right to retry an accused after reversal due to prejudicial publicity and that some persons subsequently acquitted of a crime in fact spent time in prison before an impartial jury finally gave them justice, would those facts alone form the basis for a finding of that quality of "danger" that would perhaps justify the imposition of a direct prior restraint on publication?

Amicus submits that such facts would not, and that the only sufficient ground for this Court's approval of a direct prior restraint on publication of facts and opinions related to criminal proceedings would be a conclusion by this Court, based upon evidence of record, that media coverage of the criminal justice process generally had reached the point where a grave threat was posed to the functioning of that system and the confidence of the citizenry in the ability of the system to try defendants fairly. If this Court is prepared to find that such a threat to the integrity of the criminal justice system presently exists, it should do so explicitly and lay on the public record the evidence upon which the finding is based. If such evidence exists, it is most certainly not presented in the record in this case, J.A. 81-98, nor is Amicus aware of any evidence dehors the record that would support such a finding. Indeed, in this case, the Supreme Court of



Nebraska apparently found that Petitioners had at all times acted responsibly and within the terms of the voluntary bar-press guidelines that were originally made mandatory by both the County and District Court. Cert. App. 62a.

If this Court is not prepared to find a general threat to the integrity of the criminal justice system posed by the publicity in this case, but nevertheless sustains the decision of the Supreme Court of Nebraska, it will have to hold that a direct prior restraint on publication can be imposed in circumstances in which publishers could not be held in contempt under the standards set forth in cases such as Bridges v. California, 314 U.S. 252 (1941), and Craig v. Harney, 331 U.S. 367 (1947).

The second possible explanation and justification for the actions of the courts below and for Mr. Justice Blackmun's opinion of November 20 is that certain types of information or editorial comment are so inherently prejudicial or inflammatory that exposure to them well in advance of trial must necessarily be held to disqualify a person so exposed from jury service in that case. <sup>12/</sup> Such a principle, at least as

<sup>12/</sup> Even if this contention could be established as a matter of law for fact, both Mr. Justice Blackmun and the courts below also appear to have made the critical assumption that such a significant number of potential jurors would be exposed so as to preclude the selection of a petit jury at some future date which had not been exposed to such publicity. Amicus would point out that not only does the record in this case not support such an assumption, but that the Supreme Court of Nebraska's reliance on the population statistics of Lincoln

applied to confessions or like material is not established by the cases relied upon by Mr. Justice Blackmun, <sup>13/</sup> nor has it been confirmed through any sociological or psychological studies of which Amicus is

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<sup>12/</sup> (Cont.) and adjacent counties to substantiate this assumption is analytically unsound. Nothing in the Federal Constitution requires the State of Nebraska or any other state to provide for any change of venue to a court outside the political subdivision in which a crime occurs. Indeed, Nebraska would be perfectly free, as a matter of state policy, to limit venue in the Simants case to Lincoln County. If, in so doing, it subsequently became clear that Simants could not receive a fair trial in Lincoln County, the state could not obtain a constitutional conviction of Simants, not because of a federal constitutional prohibition on venue but because of the state's decision to recognize its own policy of limiting venue.

<sup>13/</sup> To read Rideau v. Louisiana, 373 U.S. 723 (1963), as supporting such a per se rule as Mr. Justice Blackmun apparently did in his opinion of November 20, Cert. App. 40a-41a, is to ignore both the unique facts of Rideau itself and every case in this Court which has sought to explain this Court's subsequent understanding of the Rideau decision. Nothing in this Court's decision in Irvin v. Dowd, 366 U.S. 717 (1961), selects out confessions or any other type of information as inherently disqualifying one exposed to it for jury service.



is aware. <sup>14/</sup> To the extent that the principle is based on the notion that simple massive publicity of any kind will inevitably result in conviction of the innocent, that notion has already been refused in Part I, A supra.

To adopt such a principle, encompassing either specific types of information or massive publicity of any kind would, more importantly, put this Court in the position of establishing a per se rule on the basis of no more than sheer speculation. The establishment of any per se rule in this area was specifically eschewed by this Court in Murphy v. Florida, and Amicus respectfully contends that to reverse that position in this case would be not only error but error carrying with it enormous consequences for the administration of criminal justice in this country.

This is so for two reasons. First, because the basic inquiry in each case would be shifted from an inquiry into the actual predisposition of petit jurors to convict to a completely generalized inquiry into the nature of publicity occurring at the outset of a criminal prosecution. That publicity normally occurs with more intensity and with greater frequency at the initial states of the criminal process is both a common phenomenon and is justified by the need for the general public to become aware that the criminal process is

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<sup>14/</sup> See Brief of Petitioners at 30-31, n. 11. Amicus doubts that any empirical studies which did not use actual cases, juror exposure to publicity over a period of time and actual jurors as controls would be valid.

functioning properly at that point in time. Thus, in the usual course of events, extensive publicity will have occurred before a court possessing jurisdiction to enter a restrictive order will be able to do so, and such a situation would make a reasonable case for at least a delay or change of venue. <sup>15/</sup>

Second, because it is impossible to differentiate between "types" of information that might logically be thought to fall within such a per se rule. Both Mr. Justice Blackmun, using such language as "There may also be facts that are not necessarily implicative, but that are highly prejudicial . . .," Cert. App. 41a, and use of the phrase "Other information strongly implicative of the accused as the perpetrator of the slayings" by the Supreme Court of Nebraska, Cert. App. 64a, concede as much. And they are certainly correct. For example, is this Court prepared to find that the fact of the existence of a statement made to authorities is any more inherently prejudicial when generally publicized within a community than the disclosure that someone accused of a brutal rape-murder provided law enforcement officials with the location of the victim's body? Yet precisely that information was subjected to a direct prior restraint by the

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<sup>15/</sup> Indeed, if Mr. Justice Blackmun's opinion of November 20 were to be read as adopting a per se rule regarding certain types of information that are inherently prejudicial, it would seem that Respondent Simants' motion for a change of venue should have subsequently been granted, rather than denied as it was by the District Court.

courts of the State of Louisiana in a case permeated with what was characterized by Mr. Justice Powell as something less than "responsible journalism." Mr. Justice Powell, correctly in Amicus' view, chose to stay the prior restraints imposed by the state courts in that case, a case perhaps more laden with the potential for community prejudice than the instant one. Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (1974). Were the per se approach at least implicitly in the judgments and opinions below to be adopted, Amicus would suggest that it would result in a virtually total ban on meaningful coverage of crime and the criminal process by the media. It would blink reality to suggest that the cost of such massive constriction on the flow of information concerning the criminal justice system is either worth paying 16/ or will not come to

16/ Balanced against this cost is the spectre, advanced by the Supreme Court of Nebraska, of society's losing its right to convict a guilty person or an innocent person's being incarcerated until such time as an unfair conviction is reversed. Cert. App. 62a. As for the former, not only is Amicus unaware of any reported case in which society has ever lost its right to bring an accused to trial after a reversal of a conviction tainted by prejudicial publicity, but this Court and the Supreme Court of Nebraska must certainly be aware that the convictions of admittedly guilty persons are reversed with regularity to implement the policies of the Fourth Amendment where no chance for retrial is available. As for the latter, incarceration during both the pretrial and posttrial stages of the criminal process of innocent persons is an unfortunate but accepted price we pay for our instance upon an orderly system of justice. See Gerstein v. Pugh, 420 U.S. 103 (1975).

be paid. 17/

E. The order in this case violates the First Amendment presumption against the validity of prior restraints because -- under the guise of deciding the order -- the press of Nebraska has been effectively censored since October 11.

The point Amicus would make in this regard is simply stated: if the Sixth Amendment does not of its own force require state trial judges to avoid the appearance of an eventual unfair trial, then a direct prior restraint substantiated by nothing more than what is in the record in this

17/ Mr. Justice Blackmun's observation that prior restraints on the press limited to the pretrial stages of the criminal process "may delay media coverage . . . but at least they do no more than that . . .," Cert. App. 40a, is inconsistent with this Court's oft-stated position that contemporaneous reporting of newsworthy events is often the touchstone to whether information gets communication at all. See, e.g., Bridges v. California, 314 U.S. 252 (1941). In short, old news is no news at all. Furthermore, as illustrated by this case, publication in January 1976 of facts concerning the operation of the criminal justice system in October 1975 deprived the media of playings its accustomed and valued role of keeping the public informed on a current basis concerning the performance of their public servants, particularly whether their safety had been secured by the arrest of the probable killer of six members of their community.



case cannot be sustained unless this Court is willing to stand on its head the assumption that lies at the core of the doctrine of prior restraint.

This assumption has been, at least in this Court and until this case, that the showing necessary to justify a direct prior restraint is so extraordinary that only certain hypothetical examples, such as the publication of the sailing date of troop transports during war time, have been suggested as warranting the imposition of a direct prior restraint. Certainly were this Court to read the Sixth Amendment as compelling trial judges to enter restrictive orders like the one in this case to protect the appearance of a fair trial, then a principled distinction between this case and other prior restraint cases could perhaps at least be articulated and a true conflict between the First and Sixth Amendments be joined. Amicus would submit that the Sixth Amendment cannot be so read unless Murphy v. Florida and other Sixth Amendment decisions of this Court <sup>18/</sup> are to be overruled or severely undermined.

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<sup>18/</sup> For example, in Williams v. Florida, 399 U.S. 78 (1970), this Court rejected a Sixth Amendment challenge to the use of six-man juries because that jury size allegedly prevented the impaneling of juries drawn from a cross-section of the community. It goes without saying that if a six-man jury were to be thought as a minimal requirement of the Sixth Amendment to preserve a fair cross-section, a jury larger than that might be constitutionally required were the Sixth Amendment to be read as protecting the appearance of a fair trial.

In his concurring opinion in New York Times Co. v. United States, 403 U.S. 713, 733 (1971), Mr. Justice White, joined by Mr. Justice Stewart, quite correctly noted the "infrequency of prior restraint cases" coming to this Court. Prior restraint cases pose difficulties encountered only infrequently by this Court and other appellate courts, federal and state, in the past due to the long-understood prohibition against the entry of direct prior restraint orders against the press. Amicus takes the position that this Court, if it is to reverse this long tradition, should at least take into account the problems such an action may reasonably be expected to generate.

The potential for the frequency of the entry of direct prior restraints on the reporting of facts concerning the pretrial phase of the criminal justice process is limited only by the number of cases prosecuted or, for that matter, the number of crimes committed that come to the attention of the press. Whether such potential will be realized is, of course, dependent on the proclivities of prosecutors, trial judges and defendants, as well as a variety of other factors. Perhaps a portent of what may be expected is provided by the recent entry of two orders by the District Court of the General Court of Justice, District Court Division, in the County of Columbus, North Carolina. That court, on motion of a defendant charged with rape and first degree burglary in matters 75 CR 9298 and 9299, entered on October 28, 1975, without a hearing, identical orders which read, in pertinent part:

"IT IS THEREFORE ORDERED AND DECREED that no person, firm, or corporation shall in any manner, by radio, newspaper, television, or otherwise, publicize, report or



distribute any information whatsoever concerning the evidence witnesses, trial or proceedings in this cause without a specific order authorizing said reporting or publication from the Court."

Forty days after the entry of what must be the most extraordinary direct prior restraint ever imposed in a criminal proceeding, representatives of the media, having secured counsel, succeeded in securing from another court a stay of these orders. On January 5, 1976, that same court which had stayed the orders found them to be repugnant to the First Amendment and ordered them to be vacated. 19/

The fact that these orders could be and were entered by a state trial judge 25 years after this Court's decision in Kunz v. New York, 340 U.S. 290 (1951), is more than remarkable; it furnishes a clear example of a trial judge, having no apparent basis in law or fact, entering patently unconstitutional orders that, upon pain of contempt, commanded obedience until such time as they were reversed on appeal. In the absence of some evidence to the contrary, it would appear reasonable to assume that the trial judge who issued these orders is no more nor less schooled in the law than many trial judges throughout this country.

This Court itself has recognized in a number of cases placing substantive and procedural constitutional restrictions on

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19/ North Carolina v. Purdie, Nos. 75 CR 9298, 9299 (Gen. Ct. of Justice, Super. Ct. Div., Columbus County, N.C., Jan 5, 1976).

the use of the criminal contempt power that some state trial judges, many of whom do not hold life tenure and who therefore are inextricably bound up in the political processes and pressures within their jurisdictions, may be "complaint, biased . . . or eccentric . . . ." Bloom v. Illinois, 391 U.S. 145, 156 (1968).

To give such judges as may fit that description the power to temporarily silence media coverage of the criminal justice system, particularly in cases involving the investigation or prosecution of crimes involving public servants or political figures, certainly poses a greater threat to the fabric of our society than would the occasional abuse of the power of criminal contempt which this Court sought to curb in decisions such as Bloom. Also in the absence of evidence to the contrary, it would appear reasonable to assume that the normal appellate process within state court systems is geared to handle such grave questions as were presented by these orders in no more nor less time than were the North Carolina courts or, for that matter, the courts of the State of Nebraska in this case.

This problem of delay in appellate review of restrictive orders has proven to be a vexatious problem in this case as well as other cases. In staying his hand on November 13, Cert. App. 21a-28a, and in granting Petitioners partial relief from the restrictive order of the District Court on November 20, Mr. Justice Blackmun clearly recognized the fact that "[w]here . . . a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment." Cert. App. 37. The irreparable injury occurring daily by virtue of the Petitioners'

observance of that direct prior restraint appears to have been the decisive factor in Mr. Justice Blackmun's taking jurisdiction and granting partial relief even though an identical request for relief had been pending in the Supreme Court of Nebraska since October 31, 1975.

The delicate problems in federal-state relations underlying this assumption of jurisdiction by Mr. Justice Blackmun do not require elaboration before this Court, which dealt only last term with several aspects of what may be referred to as the Younger v. Harris, 401 U.S. 37 (1971), problem. The potential for the exacerbation of federal-state relations were state trial judges to be given a license, no matter how restricted, to issue prior restraints in virtually any criminal proceedings, is, in a word, staggering. Passing the question whether this Court has the capacity, given its crowded docket, to give the facts of each case the careful scrutiny required on the basis of hastily submitted applications for stay, 20/ it is clear that the delay

20/ Assuming, arguendo, that a majority of this Court were to conclude that Mr. Justice Blackmun did not have jurisdiction to enter any stay on November 20, Amicus finds it difficult to believe that such a result, given the nature of irreparable loss occasioned by the imposition of an unconstitutional direct prior restraint, would not require this Court ultimately to carve out a narrow exception to the doctrine of Younger v. Harris, 401 U.S. 37 (1971), thereby giving every United States District Court jurisdiction under 28 U.S.C. § 1343(3) to step in where state appellate courts refused timely review of direct prior restraint orders. The complex federalism and res judicata questions inherent in such an exception are obvious.

occasioned in this case itself must be judged as an unacceptable price to pay.

The delay in this case is illustrative of the fact that, due to the lack of procedural due process and speedy appellate review in the formulation and review of such orders, the "heavy presumption" against the constitutionality of such orders which all members of this Court have at one time or another embraced has been, for all intents and purposes, obliterated, if not reversed outright.

Nor is the irreparable damage suffered through delay in appellate review of such orders limited to state courts or criminal proceedings. In CBS, Inc. v. Young, 511 F.2d 234 (6th Cir. 1975), a direct prior restraint imposed on, inter alia, "relatives, close friends, and associates" of plaintiffs and defendants in a civil action of nationwide interest was in effect for almost two months before it was held unconstitutional on a writ of mandamus sought by the Columbia Broadcasting System. And in ABC, Inc. v. Smith Cabinet Mfg. Co., 312 N.E.2d 85 (Ind. Ct. App. 1st Dist. 1974), a direct prior restraint imposed on the telecast of a program was held unconstitutional after that restraint had been in effect for 291 days after the scheduled telecast of that program. And in Cooper v. Rockford Newspapers, Inc., No. 75-222 (App. Ct. 2d Dist. Ill., Dec. 24, 1975), a direct prior restraint prohibiting a newspaper publisher from "writing editorials or editorializing" about a libel action brought by a court official against that newspaper was in effect for almost eight months before it was finally held unconstitutional by an appellate court.

The teaching of these cases, and they are not intended to be exhaustive of the



problem, is that direct prior restraints on publication have been so infrequent that our court systems, both federal and state, are not designed to expedite the review of such orders in a way that would even marginally prevent the grave and irreparable damage to First Amendment interests that each and every order would threaten. The recent proposal of the Legal Advisory Committee on Fair Trial and Free Press of the American Bar Association deals with this problem by recommending that expeditious review of such restrictive orders be provided, <sup>21/</sup> but Amicus doubts that even "expedited" review of such orders would truly suffice to prevent the massive damage capable of being inflicted by the imposition of unconstitutional direct prior restraint orders. One method of minimizing this loss would be to impose a rule automatically staying all such orders until such time as full appellate review had been afforded to any interested parties.

## II.

THE FREE PRESS PROTECTIONS OF THE FIRST AMENDMENT AND THE PUBLIC TRIAL PROTECTIONS OF THE SIXTH AMENDMENT GUARANTEE PUBLIC ACCESS TO AND PUBLICATION OF INFORMATION ABOUT ALL CRITICAL STAGES OF THE PRETRIAL CRIMINAL JUSTICE PROCESS; AND THIS ISSUE SHOULD NOT BE DECIDED BY THIS COURT BECAUSE IT WAS NEITHER BRIEFED NOR ARGUED IN THE NEBRASKA COURTS BELOW

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<sup>21/</sup> Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press (Rev. Draft Nov. 1975), at 17.

This case was argued in the trial court and in the Nebraska Supreme Court under an accepted assumption by all parties that Nebraska law required all pretrial proceedings to be open to the public and the press.

The court sealing issue was first raised in the Nebraska Supreme Court decision -- authorizing the trial judge to close any pretrial proceedings which he believed would elicit information "likely" to interfere with the selection of an impartial jury.

For that reason, Amicus urges this Court not to address the question of sealed court proceedings because Petitioners have had no opportunity to present evidence or argument in the courts below in support of the contention that most pretrial proceedings must be kept open under the First and Sixth Amendments.

In many ways, the authorization to conduct secret pretrial proceedings poses as much of a threat to the public's right to know about its courts as the prior restraint order barring the publication of confessions in this case. Certainly, as the New York Court of Appeals pointed out in Oliver v. Postel, 30 N.Y.2d 171, 331 N.Y.S.2d 407 (1972) (where a judge sealed an entire trial), as the United States Court of Appeals for the Fifth Circuit pointed out in United States v. CBS, Inc., 497 F.2d 102 (1974) (prohibition of sketch artist attending a trial), and as pointed out by the Sixth Circuit in CBS, Inc. v. Young, 522 F.2d 234 (1975) ("relatives" of parties barred from talking to the press), the most effective and uniform method of restraining the publication of court news is simply to seal off the source of the news.

While there is always the possibility that a news organization could penetrate



this secrecy and obtain information about the proceedings from a confidential news "source," the First Amendment does not permit such severe burdens to be placed on access to news which ought to be available to the public.

This Court has recognized, for example, in Cox that post-publication criminal and civil remedies for publication of public court information are effective prior restraints.

This Court has recognized that illegally barring access by citizens to public forums to exercise their free speech rights is prior restraint on the exercise of the First Amendment rights. E.g., Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175 (1968); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

Furthermore, in Southeastern and Carroll, this Court has imposed the most severe due process protections -- with the burden on the state -- before access to public forums can be denied to the public.

It is the contention of Amicus that the Nebraska Supreme Court decision, limiting public access to pretrial proceedings, while, by implication (relying on the ABA Standards), approving of public access during the trial itself, violates the First and Sixth Amendments.

The Nebraska Supreme Court has misconceived the nature of the public trial guarantee because pretrial proceedings are frequently the factual key to a pending criminal charge.

It is at the pretrial proceedings stage where information of government corruption and abuse -- or evidence of defense

corruption or abuse -- may be elicited. The entire dispute in United States v. United States District Court, 407 U.S. 297 (1972) -- over the constitutionality of national security wiretaps -- occurred during pretrial proceedings.

The famous 18-minute gap in the Nixon tapes was most fully brought out in a pretrial proceeding. The break-in at the office of Dr. Daniel Ellsberg was brought out in a pretrial proceeding. The use by the FBI of an informant in the Berrigan case was brought out in a pretrial proceeding. The allegations by former Vice President Spiro Agnew that the Justice Department was leaking adverse information about him to the press was brought out in a pretrial proceeding.

Furthermore, motions to suppress evidence based on illegal searches, illegal seizures and illegal entrapments are frequently accompanied by motions granted or denied during these hearings, to lower a charge, to dismiss an indictment, to sever a defendant, to strike a defense, or may result in an immediate change of plea from innocent to guilty.

Therefore, pretrial proceedings, in and of themselves, can produce important facts and key judicial decisions as to innocence or guilt -- facts and rulings as definitive and newsworthy as facts and rulings which occur in a jury trial.

It is no solution to say, as the American Bar Association Standards say, that after the trial is over, the pretrial transcript may be open to the press. The press is not in the business of writing history. News is a fungible commodity. Today's front page story on an illegal search testified to in a pretrial proceeding may be of little

or no interest three months later when the trial is over. Editors and reporters, not judges, have been given the right under the First Amendment to decide the daily flow of news about the courts.

Furthermore, authorizing sealings of pretrial proceedings raises substantial chilling effects under the First Amendment. If a news person gains access to forbidden information elicited from sealed court proceedings or documents, he may be held in contempt for refusing to reveal his source, two instances of which are now pending before this Court. Farr v. Pritchess, No. 75-444, and Rosato v. Superior Court, No. 75-919 (both pending on petitions for writs of certiorari).

It has also been suggested that a news person -- who knows that a proceeding is secret and yet induces an attorney or prosecutor to release the forbidden information -- may be liable for contempt for actively conspiring to break the court's order.

But perhaps most important, there are 1300 daily newspapers in this nation and some 3000 VHF stations. Only a very few have adequate manpower to assign dozens of reporters to sealed criminal court proceedings in an effort to obtain information which they believe would be of interest to the public and who are willing to assume the risk of being held in contempt for refusing to disclose who gave them the information and then be willing to assume the heavy legal fees associated with this type of litigation.

This Court should take judicial notice that the ordinary trial court structure in the nation is composed of judges who are generally connected to the local two-party

system, either because they must run for elected office or are appointed by those who run for office.

These local trial courts have maintained their integrity, in the face of frequent charges of political corruption against the local executive and legislative branches, precisely because, until now, they believed that they had to keep open most of their proceedings to the public and the press. For this Court to give to the local judiciary the unfortunate veil of secrecy which is enjoyed by local executive and legislative bodies will certainly -- if history is any guide -- produce the same unfortunate results.

#### CONCLUSION

There would appear to Amicus to be no safe middleground in this dispute; either trial courts may constitutionally shut off the pretrial administration of criminal justice to the public and press or they may not. Amicus submits that, after careful consideration of the arguments advanced by Petitioners as supplemented herein, this Court, perceptive to the grave and uncontrollable dangers inherent in affirmance of the decision below, will reverse the principle that a system of direct prior restraints on press freedom is contrary to our system of government. <sup>that decision and, in doing so, reaffirm</sup>

Respectfully submitted,

LAWRENCE SPEISER

1225 19th Street, N.W.  
Washington, D.C. 20036

Attorney for The Reporters  
Committee for Freedom of  
the Press Legal Defense  
and Research Fund, Amicus  
Curiae

January 26, 1976

Supreme Court, U. S.

FILED

JAN 30 1976

MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1975

**No. 75-817**

NEBRASKA PRESS ASSOCIATION, et al.,  
*Petitioners,*

v.

THE HONORABLE HUGH STUART, JUDGE  
District Court of Lincoln County, Nebraska, et al.  
*Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF NEBRASKA

**BRIEF OF  
THE NATIONAL PRESS CLUB  
AS AMICUS CURIAE**

**WILLIAM I. HARKAWAY**

Belnap, McCarthy, Spencer,  
Sweeney & Harkaway  
1750 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006



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IN THE  
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### Opinions Below

The opinions of the County Court of Lincoln County, Nebraska, dated October 22, 1975, and the District Court of Lincoln County, Nebraska, dated October 27, 1975, are set forth at Cert. App. 1a and 9a. The per curiam statement of the Nebraska Supreme Court, issued on November 10, 1975, is set forth at Cert. App. 19a. The opinion of Mr. Justice Blackmun, dated November 13, 1975, is set forth at Cert. App. 21a. The Order of the Nebraska Supreme Court for Hearing and Order to Show Cause entered on November 18, 1975, is set forth at Cert. App. 29a. The opinion of Mr. Justice Blackmun, dated November 20, 1975, is set forth at Cert. App. 35a. The majority concurring and dissenting opinions of the Nebraska Supreme Court dated December 1, 1975, are set forth at Cert. App. 44a and are reported at 63 Neb. S.C.J. 782, \_\_\_ N.W.2d \_\_\_. The Orders of this Court, dated December 8, 1975, and December 12, 1975, inter alia, granting the motion for petitioners to treat papers previously filed by them with this Court as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska and granting said Petition are set forth at Cert. App. 70a and 71a. Except as indicated above, none of said opinions is thus far reported.

### Jurisdiction

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

### Consent

This brief is filed with the consent of the parties.

### Argument

This brief, on behalf of the National Press Club, amicus curiae, adopts the arguments set forth in the brief amicus curiae of The Reporters Committee for Freedom of the Press, Legal Defense and Research Fund, to wit:

"I. It is a violation of the First and Fourteenth Amendments to the United States Constitution for an injunction to issue prohibiting publication by the press of information obtained from public court proceedings, from public court records, and from other sources about pending judicial proceedings involving an adult.

II. The free press protections of the First Amendment and the public trial protections of the Sixth Amendment guarantee public access to and publication of information about all critical stages of the pretrial criminal justice process; and this issue should not be decided by this court because it was neither briefed nor argued in the Nebraska courts below."

### Interest of the Amicus

As the largest press club in the United States, with members in forty-nine states and the District of Columbia, this amicus believes that the decision in this case poses a direct immediate



and irreparable injury to the public's right to know about the operation of the criminal justice system and therefore urges this Court to reverse the order of the Supreme Court of Nebraska.

Respectfully submitted,

WILLIAM I. HARKAWAY  
1750 Pennsylvania Ave., NW  
Washington, D.C. 20006

Attorney for The National  
Press Club  
Amicus Curiae

JAN 26 1976

MICHAEL RUDAK, JR., CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1975

**No. 75-817**

NEBRASKA PRESS ASSOCIATION, et al., *Petitioners*,

v.

HON. HUGH STUART, *Respondent*.

BRIEF OF THE WASHINGTON POST COMPANY, AMERICAN BROADCASTING COMPANIES, INC., THE TIMES MIRROR COMPANY, THE GLOBE NEWSPAPER COMPANY, NEWSDAY, INC., THE MIAMI HERALD PUBLISHING COMPANY, THE KANSAS CITY STAR COMPANY, THE HOUSTON POST COMPANY, THE PULITZER PUBLISHING COMPANY, MINNEAPOLIS STAR AND TRIBUNE COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, THE DENVER PUBLISHING COMPANY, THE TIMES HERALD PRINTING COMPANY, THE COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, THE COPLEY PRESS, INC., THE A. S. ABELL COMPANY, TIMES PUBLISHING COMPANY, TENNESSEAN NEWSPAPERS, INC., KEARNS TRIBUNE CORPORATION, PRESS-ENTERPRISE COMPANY, SUN NEWSPAPERS OF OMAHA, INC., KEYSTONE PRINTING SERVICE, INC., THE CONSOLIDATED PUBLISHING COMPANY, THE FREE LANCE-STAR PUBLISHING COMPANY OF FREDERICKSBURG, VIRGINIA, THE SUSQUEHANA PUBLISHING COMPANY, AND HERALD REGISTER PUBLISHING COMPANY, AMICI CURIAE, IN SUPPORT OF REVERSAL

On Writ of Certiorari to the Supreme Court of Nebraska

JOSEPH A. CALIFANO, JR.  
JOHN G. KESTER  
RICHARD M. COOPER  
JOHN B. KUHN  
BENJAMIN W. HEINEMAN, JR.  
WILLIAMS, CONNOLLY & CALIFANO  
1000 Hill Building  
Washington, D. C. 20006  
(202) 331-5000  
*Attorneys for Amici Curiae*

*Of Counsel:*

ALAN R. FINBERG, Esq.  
VICE PRESIDENT, SECRETARY  
AND GENERAL COUNSEL  
THE WASHINGTON POST COMPANY  
444 Madison Avenue  
New York, New York 10022  
*Attorney for The  
Washington Post Company*  
ROBERT C. LOBDELL, Esq.  
VICE PRESIDENT AND  
GENERAL COUNSEL  
LOS ANGELES TIMES  
Times Mirror Square  
Los Angeles, California 90053  
*Attorney for The Times  
Mirror Company*  
DAVID R. HARDY, Esq.  
SHOOK, HARDY & BACON  
915 Grand Avenue  
Kansas City, Missouri 64106  
*Attorney for The  
Kansas City Star Company*  
NORTON L. ARMOUR, Esq.  
GENERAL COUNSEL AND  
SECRETARY  
MINNEAPOLIS STAR AND  
TRIBUNE COMPANY  
Minneapolis, Minnesota 55415  
*Attorney for Minneapolis  
Star and Tribune Company*  
BRUCE W. SANFORD, Esq.  
BAKER, HOSTETLER &  
PATTERSON  
Union Commerce Building  
Cleveland, Ohio 44115  
*Attorney for The Denver  
Publishing Company*  
JOSHUA L. NEPPER, Esq.  
GRAY, CARY, AMES & FRYE  
2100 Union Bank Building  
San Diego, California 92101  
*Attorney for The Copley  
Press, Inc.*

SAM ANTAR, Esq.  
GENERAL ATTORNEY  
AMERICAN BROADCASTING  
COMPANIES, INC.  
1330 Avenue of the Americas  
New York, New York  
*Attorney for American  
Broadcasting Companies, Inc.*  
DAN PAUL, Esq.  
PAUL & THOMPSON  
1300 Southeast First National  
Bank Building  
Miami, Florida 33131  
*Attorney for The Miami  
Herald Publishing Company*  
JAMES A. CROWTHER, Esq.  
VICE PRESIDENT AND  
GENERAL COUNSEL  
THE HOUSTON POST  
4747 Southwest Freeway  
Houston, Texas 77001  
*Attorney for The  
Houston Post Company*  
GARY G. GERLACH, Esq.  
SECRETARY AND GENERAL  
COUNSEL  
DES MOINES REGISTER AND  
TRIBUNE  
Des Moines, Iowa 50304  
*Attorney for Des Moines  
Register and Tribune  
Company*  
EDGAR A. ZINGMAN, Esq.  
WYATT, GRAFTON & SLOSS  
28th Floor  
Citizens Plaza  
Louisville, Kentucky 40202  
*Attorney for The Courier-  
Journal and Louisville Times  
Company*  
DONALD B. HOLBROOK, Esq.  
JONES, WALDO, HOLBROOK &  
McDONOUGH  
800 Walker Bank Building  
Salt Lake City, Utah 84111  
*Attorney for Kearns Tribune  
Corporation*



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION, et al., *Petitioners*,  
v.  
HON. HUGH STUART, *Respondent*.

**BRIEF OF THE WASHINGTON POST COMPANY, AMERI-  
CAN BROADCASTING COMPANIES, INC., THE TIMES  
MIRROR COMPANY, THE GLOBE NEWSPAPER COM-  
PANY, NEWSDAY, INC., THE MIAMI HERALD PUBLIS-  
HING COMPANY, THE KANSAS CITY STAR COMPANY,  
THE HOUSTON POST COMPANY, THE PULITZER PUB-  
LISHING COMPANY, MINNEAPOLIS STAR AND TRIBUNE  
COMPANY, DES MOINES REGISTER AND TRIBUNE COM-  
PANY, THE DENVER PUBLISHING COMPANY, THE  
TIMES HERALD PRINTING COMPANY, THE COURIER-  
JOURNAL AND LOUISVILLE TIMES COMPANY, THE  
COPLEY PRESS, INC., THE A. S. ABELL COMPANY, TIMES  
PUBLISHING COMPANY, TENNESSEAN NEWSPAPERS,  
INC., KEARNS TRIBUNE CORPORATION, PRESS-ENTER-  
PRISE COMPANY, SUN NEWSPAPERS OF OMAHA, INC.,  
KEYSTONE PRINTING SERVICE, INC., THE CONSOLI-  
DATED PUBLISHING COMPANY, THE FREE LANCE-STAR  
PUBLISHING COMPANY OF FREDERICKSBURG, VIR-  
GINIA, THE SUSQUEHANA PUBLISHING COMPANY, AND  
HERALD REGISTER PUBLISHING COMPANY, AMICI  
CURIAE, IN SUPPORT OF REVERSAL**

On Writ of Certiorari to the Supreme Court of Nebraska

Twenty-five newspaper publishers and a broadcast-  
ing company submit this brief as *amici curiae* in sup-  
port of petitioners' claim that the judgment of the  
Supreme Court of Nebraska, entered on December 1,

1975, should be reversed. All parties to this action have given their written consent to the filing of this brief pursuant to Rule 42(2) of the Rules of this Court. Copies of the letters of consent have been filed with the Clerk, and are appended to this brief.

#### OPINIONS BELOW

The opinions of the County Court of Lincoln County, Nebraska, dated October 22, 1975, and the District Court of Lincoln County, Nebraska, dated October 27, 1975, are set forth in the Appendix to the Amended Petition for Certiorari (hereinafter, "Cert. Pet'n Appendix") at p. 1a and p. 9a. The *per curiam* statement of the Nebraska Supreme Court issued on November 10, 1975 is set forth in the Cert. Pet'n Appendix at p. 19a. The opinion of Mr. Justice Blackmun, dated November 13, 1975 is set forth in the Cert. Pet'n Appendix at p. 21a. The Order of the Nebraska Supreme Court for Hearing and Order to Show Cause entered on November 18, 1975 is set forth in the Cert. Pet'n Appendix at p. 29a. The opinion of Mr. Justice Blackmun dated November 20, 1975 is set forth in the Cert. Pet'n Appendix at p. 35a. The majority and dissenting opinions of the Nebraska Supreme Court dated December 1, 1975 are set forth in the Cert. Pet'n Appendix at p. 44a and are reported at 63 Neb. S.C.J. 783, — N.W. 2d —. The Orders of this Court, dated December 8, 1975 and December 12, 1975, *inter alia*, granting the motion of petitioners to treat papers previously filed by them with this Court as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska and granting the Petition are set forth in the Cert. Pet'n Appendix at p. 70a and p. 71a. Except as indicated above, none of the opinions below has thus far been reported.

#### JURISDICTION

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

#### CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Sixth Amendment to the Constitution of the United States provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

#### QUESTIONS PRESENTED

1. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, an injunction may issue prohibiting publication by the news media of information revealed in public court proceedings, in public court records, and from other sources about crimes and pending judicial proceedings.

2. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, a direct prior restraint may be imposed upon the

publication by the press of information which does not relate to national security and which would not surely result in direct, immediate and irreparable injury to the nation or its people.

3. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, the injunction of the Nebraska Supreme Court dated December 1, 1975 prohibiting publication by the petitioners can be sustained as a matter of fact and law on this record.

#### INTEREST OF THE AMICI

*Amici* are 25 publishers of general circulation newspapers and a broadcasting company. They frequently report to the public on the progress of criminal cases. *Amici* represent a broad spectrum of the American newspaper publishing industry. They are located in great cities and small towns in states as diverse as Massachusetts, Alabama, Colorado, Minnesota, Illinois, California, Nebraska, Virginia, and Texas, among others. They are diverse in size—with average circulations ranging from over one million daily to under 5,000 weekly. Each weekday their combined average circulation is nearly seven million. They are also diverse in editorial viewpoint.

The Washington Post Company and its subsidiaries publish *The Washington Post* (cir. 538,000), *The Trenton Times* (cir. 74,000), and *Newsweek* (weekly cir. 10,900,000), and own and operate television and radio stations.

American Broadcasting Companies, Inc. operates national television and radio networks, and owns and operates television and radio stations.

The Times Mirror Company publishes the *Los Angeles Times* (cir. 1,038,000).

The Globe Newspaper Company publishes *The Boston Globe* (cir. 453,000).

Newsday, Inc. publishes *Newsday* (cir. 450,000).

The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc., publishes *The Miami Herald* (cir. 402,000).

The Kansas City Star Company publishes *The Kansas City Times* (cir. 326,000), *The Kansas City Star* (cir. 302,000), and the *Sunday Kansas City Star* (cir. 400,000).

The Houston Post Company publishes *The Houston Post* (cir. 309,000).

The Pulitzer Publishing Company publishes the *St. Louis Post-Dispatch* (cir. 275,000), *The (Tucson) Arizona Daily Star* (cir. 59,000), and *The Arizona Sunday Star* (cir. 106,000).

Minneapolis Star and Tribune Company publishes the *Minneapolis Star* (cir. 242,000) and the *Minneapolis Tribune* (cir. 223,000).

Des Moines Register and Tribune Company publishes *The Des Moines Register* (cir. 229,000), *Des Moines Sunday Register* (cir. 433,000), *Des Moines Tribune* (cir. 95,000), and *The Jackson (Tenn.) Sun* (cir. 31,000).

The Denver Publishing Company publishes *Rocky Mountain News* (cir. 224,000).

The Times Herald Printing Company publishes *The Dallas Times Herald* (cir. 222,000) and *The Saturday Times Herald* (cir. 251,000).



The Courier-Journal and Louisville Times Company publishes *The Courier-Journal* (cir. 211,000), *The Louisville Times* (cir. 165,000), and *The Courier-Journal & Times* (Sunday cir. 345,000).

The Copley Press, Inc. publishes *The San Diego Union* (cir. 180,000) and *San Diego Tribune* (cir. 125,000).

The A. S. Abell Company publishes *The* (Baltimore) *Sun* (cir. 172,000), *The Evening Sun* (cir. 176,000), and *The Sunday Sun* (cir. 345,000).

Times Publishing Company publishes *The St. Petersburg Times* (cir. 171,000), and the *Evening Independent* (cir. 32,000).

Tennessean Newspapers, Inc. publishes *The* (Nashville) *Tennessean* (cir. 133,000).

Kearns Tribune Corporation publishes *The Salt Lake Tribune* (cir. 101,000).

Press-Enterprise Company publishes *The* (Riverside, Cal.) *Press* (cir. 33,000), *The Daily Enterprise* (cir. 53,000), and *The Press-Enterprise* (Sunday cir. 89,000).

Sun Newspapers of Omaha, Inc. publishes the *Omaha Sun* newspapers (combined weekly cir. 40,000).

Keystone Printing Service, Inc. publishes *The* (Waukegan, Ill.) *News-Sun* (cir. 40,000) and *The Libertyville Independent-Register* (weekly cir. 7,000).

The Consolidated Publishing Company publishes *The Anniston* (Ala.) *Star* (cir. 28,000).

The Free Lance-Star Publishing Company of Fredericksburg, Virginia publishes the *Free Lance-Star* (cir. 23,000).

The Susquehanna Publishing Company publishes *The* (Havre de Grace, Md.) *Record* (weekly cir. 7,300).

Herald Register Publishing Company publishes the *Grinnell* (Iowa) *Herald-Register* (weekly cir. 4,250).

All these *amici* would be adversely affected in their capacity to report the news to the American public if the decision of the Nebraska Supreme Court were permitted to stand.

#### STATEMENT

On October 18, 1975, a multiple murder was committed in Sutherland, Nebraska. The next day, Erwin Simants was charged with the crimes; and a preliminary hearing was set for October 22 in the County Court of Lincoln County, Nebraska. On October 21, the prosecutor moved for an order imposing prior restraints on news media coverage of the case. Defendant Simants moved for a broader order that would close the preliminary hearing altogether to the press and the public.

On October 22, the County Court entered a prior restraint. Although no evidence had been taken concerning any risk to a fair trial, the County Court found that:

"there is a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury in the event that the defendant is bound over to the District Court for trial in the matter now pending before this Court."

On the basis of this totally unsupported "finding," the County Court issued an order completely barring public discussion of the evidence offered at the prelim-

inary hearing. The order provided that no participant in the proceeding "nor any other person present in Court, shall release or authorize the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing." The court then went on to issue an even broader prohibition on public discussion of the case:

"IT IS FURTHER ORDERED that no party to this case, law enforcement official, public officer, attorney, witnesses or news media disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosures and Reporting of Information Relating to Imminent or Pending Criminal Litigation, a copy of which is attached hereto and made a part hereof."

The court made certain limited exceptions from its order.<sup>1</sup> Finally, the County Court provided that its order would remain in effect "until modified or rescinded by a higher court or until the defendant is ordered released from these charges." The order con-

<sup>1</sup> The exceptions were: (1) "Factual statements of the accused person's name, age, residence, occupation, and family status." (2) "The circumstances of the arrest, namely, the time and place of the arrest, the identity of the arresting and investigating officers and agencies, and the length of the investigation." (3) "The nature, substance, and text of the charge, including a brief description of the offenses charged." (4) "Quotations from, or any reference without comment to, public records of the Court in the case, or to other public records or communications heretofore disseminated to the public." (5) "The scheduling and result of any stage of the judicial proceeding held in open court in an open or public session." (6) "A request for assistance in obtaining evidence." (7) "A request for assistance in the obtaining of evidence or the names of possible witnesses."

tained no provision for termination of the gag upon conviction of the accused.

The Bar-Press Guidelines incorporated in the County Court order contain a preamble, which provides:

"These voluntary guidelines reflect standards which bar and news media representatives believe are a reasonable means of accommodating, on a voluntary basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial. They are not intended to prevent the news media from inquiring into and reporting on the integrity, fairness, efficiency and effectiveness of law enforcement, the administration of justice, or political or governmental questions whenever involved in the judicial process. As a voluntary code, these guidelines do not necessarily reflect in all aspects what the members of the bar or the news media believe would be permitted or required by law."

Despite these provisions, the court converted this voluntary code into a court order enforceable by the contempt power.

The preliminary hearing was held as scheduled on October 22, after the entry of the foregoing gag order; and defendant Simants was bound over to the District Court of Lincoln County for trial.

On the following day, the Nebraska Press Association and the other petitioners moved in the District Court to intervene in the criminal case for the purpose of challenging the gag order that had been entered by the county court. The motion was granted. Defendant Simants moved to continue the county court gag order in effect.



On October 27, the District Court, *per* Judge Hugh Stuart, the respondent, terminated the county court gag order, and entered a new order of its own. Although no evidence had been taken on the issue, the District Court made a new "finding":

"THE COURT, BEING DULY INFORMED, FINDS because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial and that an order setting forth the limitations of pre-trial publicity is appropriate, and an order for the news media and the public's accommodation to physical facilities is appropriate."

The District Court gag order began by adopting *in toto* the previously voluntary Bar-Press Guidelines. The court then "clarified" the Guidelines in the following respects:

"1. It is hereby stated that the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing is 'pre-trial' publicity.

"2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it.

"3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported.

"4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at the careful discretion of the press. The testimony of this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.

"5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assaults by the defendant will not be reported.

"6. The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported."

The District Court further ordered that no photographs be taken on the third or fourth floors of the courthouse for the duration of the case, and it imposed restrictions on physical access to the third floor of the courthouse. Finally, the court provided that its order would remain in effect "until further order of the Court or until completion of this case."

On October 31, the Press Association appealed to the Nebraska Supreme Court from the District Court gag order, and moved for "immediate hearing and disposition." Simultaneously, the Press Association filed an original action for a writ of mandamus from the same court. Nothing was heard from the court until



November 4, when its Clerk advised the Association that under the court's rules "all motions must be noticed for a day certain when the court is regularly in session," and that the "next date for submission of such a matter will be Monday, December 1, 1975 . . . ."

The next day, November 5, the Press Association applied to Mr. Justice Blackmun, the Circuit Justice, for a stay of the District Court order. On November 10, the Nebraska Supreme Court issued a *per curiam* statement declining to act on the Association's appeal and petition for mandamus while the matter was pending before Mr. Justice Blackmun.

On November 13, Mr. Justice Blackmun denied the stay without prejudice to a renewed application. He pointed out that "[t]he order in question obviously imposed significant prior restraints on media reporting. It therefore comes to me 'bearing a heavy presumption against its constitutional validity.'" He added "that the very day-by-day duration of [a delay by the Nebraska Supreme Court until December 1] would constitute and aggravate a deprivation of such constitutional rights, if any, that the petitioners possess and may properly assert." However, he concluded that the Nebraska Supreme Court should be given a clear opportunity to act.

On November 18, the Nebraska Supreme Court set oral argument on the Press Association's appeal and mandamus petition for November 25. That additional delay prompted the Press Association to return to Mr. Justice Blackmun with a renewed application for a stay. On November 20, Mr. Justice Blackmun decided to act. He explained why:

"One full week has elapsed since my chambers opinion was filed. No action has been taken by the Supreme Court of Nebraska during that week . . . .

"Whether the Nebraska court will reach a definitive decision on November 25, or very shortly thereafter, I do not know. Obviously, at least 12 days will have elapsed, without action, since the filing of my chambers opinion, and more than four weeks since the entry of the District Court's restrictive order. I have concluded that this exceeds tolerable limits."

On the merits, Mr. Justice Blackmun granted a partial stay of the District Court order. He stayed the "mandatory and wholesale imposition" of the Bar-Press Guidelines, but left the state courts free to impose particular provisions "so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately specific and in keeping with the remainder of" his order. He found "[n]o persuasive justification . . . for those parts of the restrictive order that prohibit the reporting of the details of the crimes, of the identities of the victims, or of the testimony of the pathologist at the preliminary hearing that was open to the public . . . . These facts in themselves do not implicate a particular putative defendant." Accordingly, he stayed paragraphs 4 and 5 of the District Court order. He further stayed the order

"[t]o the extent, if any, that [it] prohibits the reporting of the pending application to the Supreme Court of Nebraska, and to the extent, if any, that the order prohibits the reporting of the facts of the filing of my chambers opinion of November 13, or of this opinion (other than those parts of the opinions that include facts properly suppressed) . . . ."

Finally, he modified paragraph 6 of the District Court order to accord with his other modifications of the

order. The remainder of the District Court order remained in force because Mr. Justice Blackmun declined "at least on an application for a stay and at this distance, [to] impose a prohibition upon the Nebraska courts from placing any restrictions at all upon what the media may report prior to trial."

The parties then returned once again to the Nebraska Supreme Court. On November 24, the prosecutor and defendant Simants intervened in the hearing in that court. The hearing itself was held on November 25. And on December 1, after prior restraints of one sort or another had been in force for 39 days, the Nebraska Supreme Court issued its opinion and final order.

The court first decided two procedural matters. It ruled that the grant of petitioners' application to intervene in the criminal case was erroneous, and therefore it dismissed their appeal. However, the court granted permission for the filing of the original action for mandamus.

Turning to the merits, the court reasoned that it was "confronted with two separate questions. The first is the question of the jurisdiction of the court over the persons of the relators. The second is the sufficiency of the evidence to support the necessity of an order imposing some prior restraints, assuming that prior restraint in any degree is constitutional."

The court answered the first question in a curious way. Although it had held that intervention is not permissible in a criminal case and that therefore the District Court's granting of petitioners' motion to intervene had been erroneous, it held nevertheless that that erroneous grant of intervention gave the District Court

jurisdiction over the petitioners for the purpose of the gag order.<sup>2</sup> Indeed, the Nebraska Supreme Court expressly pointed out that the gag order "applies only to the relators." And it applies only to them because the District Court had erroneously (but effectively) asserted jurisdiction over them.

The court then turned to the "evidence" bearing on its second question. That "evidence" consisted of "the testimony of the county judge who had entered the prior order and copies of numerous news articles from newspapers printed or circulated in the county where the crime occurred." The court also took judicial notice of the population of Lincoln County and surrounding counties (to which venue might be changed under Nebraska law), and offered its own armchair evaluations of the nature and effectiveness of news coverage. On this slender basis, the court concluded that some prior restraint on the press in this case was justified.

However, the Nebraska Supreme Court found the District Court order unacceptable and therefore modified it as follows:

"It shall be effective only as to events which have occurred prior to the release of this opinion, and only as it applies to the relators herein, and only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interests [sic] made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused

<sup>2</sup> The striking consequence of the court's ruling is that although the District Court order bound the petitioners, and restrained their exercise of First Amendment rights, they had no right to appeal from it!



to third parties, excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings."

This is the order that is before this Court for review. It is the fourth different prior restraint to be imposed in this case.

The Nebraska Supreme Court ended its opinion by construing a Nebraska statute as permitting the conduct of preliminary hearings closed to the press and the public.

The trial of Erwin Simants began on January 5, 1976. Judge Stuart initially barred the public and the press from observing the selection of the jury. He then opened those proceedings to the public, but ruled that newsmen could enter the courtroom only if they agreed to restrictions on what could be reported. Many newsmen refused to agree, and were barred from the courtroom. On January 8, the selection of the jury was completed, the jury was sequestered, and the restrictions on the press were terminated. On January 17, Simants was convicted of first degree murder. His defense had been not guilty by reason of insanity.

## SUMMARY OF ARGUMENT

### I

The core of the First Amendment is its prohibition of prior restraints against the press, which derives from our firm rejection of the English system of licensing.

A system of prior restraints presents special evils. It expands the range of government control of expression. It shuts off communication before it takes place.

Suppression by a stroke of the pen is more likely to be applied than suppression through a criminal trial. The procedural protections incident to the criminal process are dispensed with. The system operates outside of public scrutiny. And its dynamics drive toward excess, as the history of all censorship shows.

This Court recognizes only one extremely limited exception to the constitutional prohibition of prior restraints—and that involves national military security. Even that exception has never been held applicable by this Court, and its application was rejected in the Pentagon Papers case.

The central question in this case is whether the Court should create a second, wholly novel, exception to the prior restraint doctrine. We submit it should not.

The cadre of censors under such a system would be trial judges and, perhaps, committing magistrates and similar officials throughout the country. They would be censoring news reporting and comment on their own performance, among other things. Moreover, the very logic of this type of censorship would require that the fact that censorship was occurring (or at least its specific nature) itself be censored.

Second, the people censored—the news media—would not be parties to any proceeding before the court.

Third, in all cases the factual predicate for issuance of the prior restraint would be armchair speculation about the imponderable impact of publicity on public opinion. That is a wholly insufficient basis for restrictions on constitutional rights.



Fourth, in gag order cases the opportunities for appellate review would be extremely limited. Any delays would magnify the abridgment of press freedom.

Fifth, while the prior restraint was in effect, the burdens of litigation would fall, not on the press alone, but also on prosecutors, defendants, and of course appellate courts. It can be expected that at least the national and metropolitan news media would litigate gag orders on appeal, to this Court if necessary. Smaller news media, which could not afford the burdens of frequent litigation, would have to acquiesce in obedient silence.

Finally, the speech at issue is not at the periphery of the First Amendment, but at its core. It is speech concerning public affairs. It is news—and the decision on whether to publish it should be made by editors, and not by judges.

Recent experience in this country demonstrates that the ultimate safeguard for the proper conduct of public affairs and the preservation of all our liberties is a public informed by the press. Secrecy at any critical stage of the criminal process will encourage abuses, and may harm rather than help the interest of defendants in fair trials.

No decision of this Court supports the imposition of prior restraints as a method for ensuring a fair trial. Prestigious committees headed by experienced judges have rejected that course.

Approval of what the Nebraska courts have done here would restrict the editorial freedom of the press, and indeed would make judges into editors. Ultimately, the affect of an affirmance in this case would be a public far less informed about the performance of the criminal justice system.

Quite apart from the fact that the gag order in this case violates the First Amendment's prohibition on prior restraints of the press, this Court has declared that the press is free to report on events that transpire in open court. The First Amendment rights at stake here are reinforced by the Sixth Amendment's provision for a public trial.

This case does not involve a "clash" between two constitutional rights. There are several alternatives to a gag order which courts can use to protect the rights of the accused. Such alternatives include change of venue; change of venire; continuance; *voir dire* examination of prospective jurors; sequestration of the jury; judicial instructions; silence orders directed at potential witnesses, parties and their lawyers; and new trials and reversals of convictions. These alternative techniques effectively protect the rights of the accused.

The decision of the Nebraska Supreme Court is fundamentally defective for failing to consider alternatives to a gag order as means to provide a trial by an impartial jury. When First Amendment rights are the issue, the government must make a clear showing that there is no less drastic means of effecting a permissible governmental purpose before the courts can even consider limiting the First Amendment rights. No such showing was made here.

## II

There is also a narrow ground for reversing the order of the Nebraska Supreme Court: its scope is totally irrational, and therefore violates the Equal Protection Clause of the Fourteenth Amendment. The only characteristic that is common to the petitioners and distinguishes them from other news media is that they

attempted to litigate to protect their First Amendment interests. First Amendment rights can be restricted only by regulations or orders that are narrowly and precisely drawn so as to serve a compelling state interest by the least restrictive means. A restrictive order that encompasses all those who asserted their First Amendment rights in court is not precisely drawn. There can be no compelling interest in muzzling some Nebraska news media while leaving others free to report and comment on pre-trial proceedings.

### III

Under the "capable of repetition, yet evading review" standard, immediate review of the gag order in this case is required even though the order has expired. The constitutional questions presented by this gag order are not unique to this case, for numerous other orders prohibiting press publication of information during pre-trial and trial proceedings have been issued by a variety of courts in recent years. Since gag orders directed against the press are generally applicable only during pre-trial or trial proceedings, and such proceedings seldom last for more than several months, Supreme Court review of a gag order still in effect is virtually impossible.

### ARGUMENT

#### I. THE ORDER OF THE NEBRASKA SUPREME COURT VIOLATES THE FIRST AMENDMENT.

The interests at stake in this case are the First Amendment freedom of the press and the Sixth Amendment right of criminal defendants to a fair trial. *Amici* recognize that both rights are fundamental, and that the preservation of both is essential for the

maintenance of a democratic society under law. It is the position of *amici* that there is no necessary conflict between those two interests, and that each can be accommodated without infringement of the other. It is also the position of *amici* that the order of the Nebraska Supreme Court, providing for secrecy at a critical stage of the criminal process, does a disservice to both.

In Part A, *infra*, we show that the First Amendment bars all prior restraints on reporting on crimes and the administration of justice.

In Part B, *infra*, we show that a restraint on reporting of public judicial proceedings and information obtained therefrom violates the First and the Sixth Amendments.

In Part C, *infra*, we show that the interest in a fair trial can be adequately protected by means of devices other than direct restraints on the press, and that therefore there is no justification for imposing on the press any orders of the sort now under review. In the instant case, the Nebraska courts failed even to consider the alternative devices available to protect the defendant's interest in a fair trial.

#### A. The First Amendment Bars All Prior Restraints on Reporting on Crimes and the Administration of Justice.

This is the first case in which this Court has had to consider on plenary review whether to uphold a direct prior restraint on news reports and editorial comment concerning crimes and the administration of justice. It is only the third case in the history of the Court in which it has had to consider on plenary review whether to uphold a prior restraint of any sort against the pub-



lication of any kind of news or comment by the news media. The other two cases were *Near v. Minnesota*, 283 U.S. 697 (1931), and *New York Times Co. v. United States*, 403 U.S. 713 (1971). In both cases, it was noted that the almost total absence in our history of prior restraints on the news media reflects a strong conviction that such restraints are unconstitutional. See 283 U.S. at 718; 403 U.S. at 715 (Black, J. concurring).

The core of the First Amendment is its prohibition of prior restraints on the press. In *Near*, the Court pointed out that "it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication." 283 U.S. at 713. Since respondent seeks to have this Court uphold a bald prior restraint on the press, it is worth recalling why prior restraints have been singled out for special condemnation.

Shortly after printing was introduced in England, a system of censorship developed, under which nothing could be published except with prior approval from state or church authorities. Milton denounced the system in ringing terms:

"Truth and understanding are not such wares as to be monopolized and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all the knowledge in the land, to make and license it like our broadcloth and our woolpacks. What is it but a servitude like that imposed by the Philistines, not to be allowed the sharpening of our own axes and coulters, but we must repair from all quarters to twenty licensing forges? . . . Truth is compared in Scripture to a streaming fountain; if her waters flow not in per-

petual progression, they sicken into a muddy pool of conformity and tradition . . . Lords and Commons of England, consider what Nation it is whereof ye are the governors: a Nation not slow and dull, but of a quick, ingenious and piercing spirit, acute to invent, subtle and sinewy to discourse, not beneath the reach of any point, the highest that human capacity can soar to . . ." J. Milton, *Aeropagitica*, in M. Hughes ed., *John Milton: Complete Poetry and Major Prose*, 736-37, 739, 742 (1957).

The system ended in 1695, and freedom from licensing came to be recognized as a common law right.<sup>3</sup> Blackstone laid down that "the liberty of the press is indeed essential to the nature of a free state," and he defined "the liberty of the press" as one which "consists in laying no previous restraints upon publication." 4 Blackstone, *Commentaries* \*\*151-52.<sup>4</sup>

In America, the English prohibition against administrative licensing was broadened into a general protection of the freedom of the press in the First Amendment.<sup>5</sup> But the condemnation of prior restraints remained central. See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). Only last Term, the Court, *per* Mr. Justice Blackmun, observed: "Our distaste for censor-

<sup>3</sup> T. Emerson, *The System of Freedom of Expression* 504 (1970).

<sup>4</sup> "The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by state and Federal constitutions." *Near v. Minnesota*, *supra*, at 714-15.

<sup>5</sup> See Madison's *Report on the Virginia Resolutions* in 4 Elliot's *Debates* 569-70 (2d ed. 1836).



ship—reflecting the natural distaste of a free people—is deep-written in our law.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

The reasons for singling out prior restraints for special condemnation have been summarized by Professor Emerson:

“A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.”<sup>6</sup>

Of course, in theory the constitutional prohibition of prior restraints has not been total. In a dictum in *Near* the Court identified three categories of exceptions. The first is the protection of national military security:

“‘When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right. *Schenck v. United States*, 249 U.S. 47, 52 [1919]. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.’” 283 U.S. at 716.

<sup>6</sup> T. Emerson, *The System of Freedom of Expression*, 506 (1970).

Second, “the primary requirements of decency may be enforced against obscene publications.” *Id.* Third, “[t]he security of the community may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not ‘protect a man from an injunction against uttering words that have all the effect of force . . . .’” *Id.*

In the 43 years since *Near* was decided, those three categories have not been expanded. See *Southeastern Promotions, Ltd. v. Conrad*, *supra* at 559. Indeed, they have been reduced, or put on a different footing. Obscenity, it is now recognized, does not present an exception to the prior restraint doctrine. It is wholly outside constitutional protection. *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476, 481 (1957). Even in dealing with licensing of arguably obscene motion pictures, the Court has not held that there is a blanket exemption from the prior restraint doctrine, but rather that systems of review must adhere to strict procedural standards so as to “obviate the dangers of a censorship system.” *Freedman v. Maryland*, 380 U.S. 51 (1965). Similarly, speech that has the effect of force is not “speech” in the constitutional sense at all, and thus is not entitled to First Amendment protection. *E.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

In sum, this Court’s cases “have indicated that there is a single, extremely narrow class of cases in which the First Amendment’s ban on prior judicial restraint may be overridden”—and that class consists of the kind of military security examples given in *Near*: obstruction of recruitment, sailing dates of transports, the number and location of troops. *New York Times Co. v. United*

*States, supra*, at 726 (Brennan, J. concurring). And even that exception was held inapplicable in *New York Times Co. v. United States, supra*, and in fact has never been applied by this Court in any case.

The question presented in this case is whether a second, wholly novel, exception to the prior restraint doctrine should be created to apply to the reporting of crimes and the administration of criminal justice. We submit that no such exception should be created. There is an "extraordinary protection against prior restraints enjoyed by the press under our constitutional system." *New York Times Co. v. United States, supra*, at 730-31 (White, J. concurring).<sup>7</sup> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States, supra*, at 714; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Bantom Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). That presumption cannot be overridden in this category of cases.

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<sup>7</sup> "According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. [Citation.] A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. [Citation.] We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer 'the power of reason as applied through public discussion' and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring) (footnote omitted).

A system of prior restraints on news reports and comment about criminal cases would have many dangerous features. It is worth considering the sober realities of such a system.

First, the cadre of censors would be state (and federal?) trial judges and, perhaps, committing magistrates and similar officials across the length and breadth of this country. Into their hands would be entrusted the power to tell newspapers, magazines, radio and television stations, and other news media what not to publish. And they could exercise that power with the mere stroke of a pen. These officials, of course, are among those whose performance of official duties would be reported and commented upon in the publications to be censored. Thus, to the normal excesses of censors, testified to by history, must be added in this kind of case the probability of further abuses resulting from the natural instinct for self-protection.<sup>8</sup> That instinct would have ample room for application because, as the present case illustrates, the logic of this kind of censorship requires that the fact that the censorship is occurring (or, at least, its specific nature) itself be censored. Judges and magistrates across the country would not only be censoring press reporting about criminal cases, but also press reporting about judicial censorship of the press.

Second, the people censored—the news media—would not be parties to any proceeding before the

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<sup>8</sup> "Judges are men, not angels. While some would exercise the power of censorship with high regard for the true interests of the judicial process, others might exercise it to prevent proper criticism of their own administration of office." S. Rifkind, *When the Press Collides with Justice*, in *Selected Essays on Constitutional Law* 651, 653 (1963).



court. In the instant case the petitioners became parties only through what the Nebraska Supreme Court found was an erroneous grant of a motion to intervene. That error presumably will not be repeated in the future. Even if some procedure could be devised for the court to assert jurisdiction over local media, there is no practical way for national media to be brought before a local criminal court every time a gag order was under contemplation. In the instant case, the restraint applies—illogically, ineffectively, and discriminatorily—only to local media who happened to intervene. Any really effective prior restraint would have to encompass national news media distributed in the locale of the court, and therefore necessarily would have to bind non-parties. Thus, this system of prior restraint would involve, *as a general feature*, severe restrictions on the First Amendment rights of parties not before the court, not able to be heard on the facts or the law, and having no right to seek appellate review except by extraordinary writ.

Third, in all cases the factual predicate for issuance of the prior restraint would be armchair speculation about the imponderable impact of publicity on public opinion. There would be no genuine evidence in such cases, as there is none in the instant case. Under whatever legal standard might be used (*e.g.*, “clear and present danger to the administration of justice,” “reasonable likelihood of prejudice,” etc.), the trial judge would have to predict what the press would publish, the tone and flavor of the publications, their frequency and prominence, and their impact on their audiences (in light of the constitutional standard for an “impartial” jury).<sup>9</sup> These calculations pile speculation upon

<sup>9</sup> See pp. 42-45, *infra*.

speculation. There simply is no way that a court (particularly, in the brief time available to it) could make, in an empirical and reliable way, the predictions that would be required. “[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.” *New York Times Co. v. United States*, *supra*, at 725 (Brennan, J. concurring). The same principle was followed in *Healy v. James*, 408 U.S. 169 (1972) (Powell, J.).<sup>10</sup> Yet surmise and conjecture are the only bases on which restraints could be imposed in the fair trial-free press context. The instant case is a perfect example of that fact.

Fourth, as the history of gag order cases has shown,<sup>11</sup> the opportunities for appellate review would be very limited. Review would come only after the prior restraint had gone into effect and was operating as a continuing abridgment of the right to publish. Since the news media would not be parties to any formal proceeding, review would be sought by original writ or stay application, and the special burdens on those who invoke those procedures would apply. Preparations by counsel and the deliberations of the reviewing court or courts would be greatly expedited, with an unavoidable adverse impact on the quality of the ultimate decision.<sup>12</sup> Throughout the days, weeks or months re-

<sup>10</sup> See also *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 508 (1969): “[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”

<sup>11</sup> See, *e.g.*, *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301 (1974) (Powell, J., in chambers), *dismissed as moot*, 420 U.S. 985 (1975); *Newspapers, Inc. v. Blackwell*, 421 U.S. 997 (1975) (stay denied).

<sup>12</sup> See *New York Times Co. v. United States*, *supra*, at 748-49, 751 (Burger, C.J., dissenting), 752-55 (Harlan, J., dissenting).



quired for even expedited appellate review, the censorship order of the trial judge would stay in force unexamined. All delays would magnify the abridgment of press freedom, as the delays of the Nebraska Supreme Court did in this case. Finally, it can be expected that unhurried plenary review would not occur in more than a tiny percentage of cases—because many would become moot, or because the current news value would go out of the case and the media could not therefore justify further counsel fees.

Fifth, while the prior restraint was in effect, the burdens of litigation would fall, not only on the press alone, but also on prosecutors, defendants, and, of course, appellate courts. For a time at least, all would be caught up in the rush of papers which a gag order case generates. The instant case, again, is illustrative. Within a period of about one month, this case went from the County Court to the District Court, to the Nebraska Supreme Court, then to Mr. Justice Blackmun at this Court, then back to the Nebraska Supreme Court, then back to Mr. Justice Blackmun, and then back again to the Nebraska Supreme Court; and eventually it has come back again to this Court. During this time, the prosecution and defense counsel were distracted from what must be their central concern—the criminal trial itself; the Attorney General of Nebraska was required to enter the case to represent the District Judge; counsel for the press had to shepherd the case from one court to another; and the schedules of both the Nebraska Supreme Court and this Court had to be disrupted by emergency applications. Perhaps this case is exceptional since the parties are urgently seeking a definitive decision from this Court. But it can confidently be expected that at least the

national and metropolitan press will not accept trial court gag orders untested, that cases of this type will in many cases generate some appellate litigation while the gag is in effect, that that litigation will necessarily be conducted on an emergency basis, and that stay applications to this Court will become routine, if not universal. It is no accident that within the last two years, this Court has received three emergency stay applications in gag order cases: *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301 (1974); *Newspapers, Inc. v. Blackwell*, 421 U.S. 997 (1975); and the instant case. If this Court gives the green light to the proposed system of prior restraints, those cases will be portents for the future.

H. Brandt Ayers, editor and publisher of *The Anniston (Ala.) Star* (circulation 28,000), one of these amici, has described in a letter to counsel the impact that the proposed system of prior restraints would have on small, independent, local newspapers such as his:

“Small town dailies would be the unknown, unseen and friendless victims if the Supreme Court upholds the order of Judge Stuart. If the already irresistible powers of the judiciary are swollen by absorbing an additional function, that of government censor, the chilling effect upon vigorous public debate would be deepest in the thousands of small towns where independent, locally owned, daily and weekly newspapers are published.

“Our papers are not read in the White House, the Congress, the Supreme Court or by network news executives. The causes for which we contend and the problems we face are invisible to the world of power and intellect. We have no in-house legal staff. We retain no great, national law firms. We do not have spacious profits with which to defend

ourselves and our principles, all the way to the Supreme Court, each and every time we feel them to be under attack.

"Our only alternative is obedient silence. You hear us when we speak now. Who will notice if we are silenced? The small town press will be the unknown soldier of a war between the First and Sixth Amendments, a war that should never have been declared, and can still be avoided.

"Only by associating ourselves in this brief with our stronger brothers are we able to raise our voices on this issue at all, but I am confident that the Court will listen to us because we represent the most defenseless among the petitioners."

Finally, the material that would be suppressed by such orders is material of high public importance. We deal here not with obscenity, not with words that amount to force. We are not at the periphery of the First Amendment, but at its heart. We deal here with news reporting and editorial comment concerning crimes and the administration of justice by public officials. This is speech "concerning public affairs"; therefore, it "is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). In *Sheppard v. Maxwell*, 384 U.S. 33, 349-50 (1966), the Court reaffirmed the importance of this kind of speech. See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (White, J.).

The material that would be suppressed is also news. The prior restraint, therefore, would hit most sharply at the daily press and its audiences. The primary function of the daily press is to report events of public interest when they occur, and not at some later time. If a judge (or any other government official) can pro-

hibit or even delay the reporting of news, that function is destroyed. Delay in these circumstances can amount to total censorship.

Recent experience in this country demonstrates the wisdom of Mr. Justice Brandeis' observation that "sunlight is the most powerful of all disinfectants."<sup>13</sup> Whether the subject matter be the conduct of a war, the conduct of the Presidency, the activities of law enforcement officers, or the performance of criminal court judges, the ultimate safeguard of the public interest is a promptly informed public. It is public opinion, informed by a free press, that is the ultimate protection of all our liberties against encroachment from any source—foreign or domestic, state or federal, legislative, executive, judicial, or private. Without conjuring up a parade of horrors, we can fairly expect that if the shroud of secrecy descends over pre-trial proceedings, or any other stage of the criminal process, abuses will occur, and that secrecy (though sought by the accused in this case) will not necessarily promote fair trials or the interests of defendants.<sup>14</sup>

The fact that the restraint will be lifted at some future time is not a sufficient answer. By the time the facts come out, public attention may have moved on to other matters, or it may be too late to repair the damage.

None of this Court's prior decisions provides any support for the imposition of direct restraints on the press in the context of criminal cases. Contempt con-

<sup>13</sup> Quoted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 308 (1964) (Goldberg, J., concurring).

<sup>14</sup> The secrecy of the Star Chamber has not generally been regarded as a safeguard of fair trials.



victions for press reporting of judicial proceedings (albeit non-jury cases) were overturned in *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941). Even in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and *Estes v. Texas*, 381 U.S. 532 (1965), where opportunities were clearly presented, the Court carefully refrained from giving any encouragement to the imposition of direct restraining on the press.<sup>15</sup>

The foregoing analysis of the dangers inherent in any system of prior restraints on press reporting of criminal cases is strongly reinforced by the conclusions of prestigious committees that have studied the free press-fair trial problem. The American Bar Association's Advisory Committee on Fair Trial and Free Press, headed by Justice Paul C. Reardon of the Supreme Judicial Court of Massachusetts;<sup>16</sup> a

<sup>15</sup> A half sentence in the lengthy opinion in *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972), speculates on the possibility of enjoining reporters from publishing information about trials "if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." No such showing of necessity exists in the present record, of course; and the only support offered for the dictum was *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and similar cases, in which this Court pointedly omitted restrictions on the press from its list of methods available to judges to preserve fair trial procedures, and said "of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom." 384 U.S. at 362-63. *Branzburg* noted specifically that "these cases involve . . . no prior restraint or restriction on what the press may publish." 408 U.S. at 681. And there is no indication that the Court intended its passing comment to authorize any restrictions on pretrial publications.

<sup>16</sup> American Bar Association, Standards Relating to Fair Trial and Free Press (tentative Draft of December 1966 and Supplement of March 1968) 68-73 (1968), but cf. Approved Draft 27.

Special Committee of the Association of the Bar of the City of New York headed by Judge Harold R. Medina of the Second Circuit;<sup>17</sup> and the Judicial Conference's Committee on the Operation of the Jury System, headed by Judge Irving Kaufman of the Sec-

<sup>17</sup> The Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial: Final Report with Recommendations 10-11 (1967): "In sum, our conclusion is that constitutional guarantees would stand in the way of most efforts to regulate the relationship between trials and the media, whether by legislation or by use of the contempt power. And perhaps this is as it should be, for such efforts would embroil the courts in constant conflicts between the courts and the media, which would naturally resist official efforts to restrict their freedom. Such conflicts would not serve to improve the administration of justice but would only estrange those whose common interest should be improvement. This would result in many criminal cases, which are now adversary proceedings between the state and the defendant, also becoming adversary proceedings between the courts and the media, and we cannot believe that this would advance the public interest. Accordingly, because we believe that as a matter of both constitutional law and policy, an approach through legislation or extension of the contempt power is neither feasible nor wise, our recommendations proceed along other lines." With respect to gag orders, the committee observed: "That such orders could be used to cover up incompetence, venality, and a deliberate but covert desire to impede or frustrate criminal procedures against guilty politicians or those involved in racial disputes and other violence seems to us to be apparent on the face of the matter." *Id.*, 44. "The prospect, in this pretrial period, of judges of various criminal courts of high and low degree sitting as petty tyrants, handing down sentences of fine and imprisonment for contempt of court against lawyers, policemen and reporters and editors, is not attractive. Such an innovation might well cut prejudicial publicity to a minimum. But at what price!" *Id.* 39.



ond Circuit,<sup>18</sup> all firmly rejected any system of prior restraints on the press.

The immediate impact of a system of prior restraints would be on the editorial freedom of the press. One cannot read the various orders entered below by the County Court, the District Court, and the Supreme Court of Nebraska without recognizing that these courts had assumed to themselves the editorship of the affected news media. Those judges were deciding, paragraph by paragraph, what could appear and what could not appear in the daily press. One judge would have blue penciled a description of the crimes; another would have let that stay. One judge would have edited out the testimony of a pathologist; another would have left it in. And so it went, as the case progressed from one court of editors to another. The entire process is offensive to the First Amendment. As Mr. Justice Stewart has expressed it, the First Amendment "gives *every* newspaper the liberty to print what it chooses, free from the intrusive editorial thumb of Government." *CBS v. Democratic National Committee*, 412 U.S. 94, 145 (1973) (concurring opinion) (emphasis in original). In *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973), the Court, *per* Mr. Justice Powell, explained:

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<sup>18</sup> Committee on the Operation of the Jury System, Report on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 401-02 (1968): "The Committee does not presently recommend any direct curb or restraint on publication by the press of potentially prejudicial material. Such a curb, it feels, is both unwise as a matter of policy and poses serious constitutional problems."

"Nor *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by the Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."

*See also* 413 U.S., at 393-97 (Burger, C.J., dissenting); 413 U.S., at 400 (Stewart, J., joined by Douglas, J., and expressing the view of Blackmun, J., dissenting) ("[The] question . . . is whether any government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot. Under the First and Fourteenth Amendments I think no government agency in this nation has any such power.").<sup>19</sup> Similarly, in *Cohen v. California*, 403 U.S. 15, 24 (1971), the Court, *per* Mr. Justice Harlan, stated:

"The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."

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<sup>19</sup> This passage was quoted approvingly by Mr. Chief Justice Burger, speaking for the Court, in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 255-56 (1974).

Most recently, in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974), the Court, *per* Mr. Chief Justice Burger, pointed out:

“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”

The ultimate impact of the system of prior restraints would be on the public. It would be deprived of current information on the progress of criminal cases. It would be able to appraise the performance of judges and other criminal justice officials only after a lag, if at all. Mr. Justice Brandeis warned that “the greatest menace to freedom is an inert people.” *Whitney v. California*, 274 U.S. 352, 375 (1927) (dissenting opinion). Approval of prior restraints on public information about criminal cases would be an unprecedented step toward making our people incapable of commenting on governmental actions.

**B. A Restraint on Reporting of Public Judicial Proceedings and Information Obtained Therefrom Violates the First and Sixth Amendments.**

The order of the Supreme Court of Nebraska restricts publication of information concerning “confessions or admissions against interest” by the defendant, and “other information strongly implicative of the accused as the perpetrator of the slayings,” whether or not such information was obtained as a

result of attendance at the preliminary hearing. That preliminary hearing was open to the public and was attended by some representatives of the press. Information within the ban of the order was made public there, and the existence of other such information may have become known therefrom.

Quite apart from the First Amendment’s prohibition on prior restraints of the press, this Court has emphatically declared—and in the very context of criminal trials of great public interest—that “of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom.” *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966). “What transpires in the courtroom is public property.” *Craig v. Harney*, 331 U.S. 367, 374 (1947).

“[R]eporters of all media . . . are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media. This was settled in *Bridges v. California*, 314 U.S. 252 (1941), and *Pennekamp v. Florida*, 328 U.S. 331 (1946), which we reaffirm.” *Estes v. Texas*, 381 U.S. 532, 541-42 (1965).

Last Term in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court reiterated that the press is free to publish information from public court proceedings and be free not only from prior restraints, but also from subsequent actions for damages. The Court stated, *per* Mr. Justice White:

“[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the pro-



ceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." 420 U.S. at 491-92.

This analysis illustrates how the First Amendment rights at stake here are reinforced by the Sixth Amendment's provision for a "public trial." Under our Constitution, the criminal justice process is not conducted in secret. *In re Oliver*, 333 U.S. 257 (1948). "Public trial is essentially a right of the accused . . . . There is, however, a correlative right to preserve the public's right to be informed about criminal prosecutions in the best interests of all its citizens." *United States ex rel. Mayberry v. Yeager*, 321 F. Supp. 199, 204 (D.N.J. 1971). In simpler, less populous times, the constitutional interest in "public" trials could be adequately served simply by holding trials in rooms with unlocked doors. Today, however, as the Court in *Cox* pointed out, citizens do not have time or opportunity to attend government functions generally, and they rely on the press for reports on what transpired. That is as true of the proceedings on the murder charges in the instant case as it was of the proceedings on the murder charges in *Cox*.

**C. The Order of the Nebraska Supreme Court Is Unconstitutional Because Less Drastic Alternatives Than a Direct Restraint on the Press Would Have Protected the Rights of the Accused and Because the Nebraska Court Failed To Consider Such Alternatives.**

The analysis underlying the Nebraska Supreme Court's order is fundamentally defective. The court viewed this case as involving a direct substantive "clash" between two constitutional rights, "the rights which are guaranteed by the First Amendment to the Constitution and the right to an impartial jury guaranteed by the Sixth Amendment . . . ." Cert. Pet'n Appendix 52a, 61a. But in determining that the press should be gagged in the instant case, the Nebraska Supreme Court failed to follow a fundamental rule of constitutional law:

"In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of governmental abridgment must be viewed in light of the less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

See also, *Gooding v. Wilson*, 405 U.S. 518, 522 (1972); *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175, 183 (1968) (applying principle to court orders affecting First Amendment rights); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).<sup>20</sup> As it

<sup>20</sup> See generally, Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970); Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969).



rushed to impose a precedent-shattering direct prior restraint on the press, the Nebraska Supreme Court did not even consider the applicability of the many alternatives to a gag order which courts can use to protect the rights of the accused. As the decisions of this Court demonstrate, such alternatives will safeguard an accused, even when widespread publicity has attended the criminal process from arrest through trial. For this reason, too, the Nebraska Supreme Court's order is invalid.

#### 1. The Right to an Impartial Jury.

The Sixth and Fourteenth Amendments guarantee to an accused the right to trial "by an impartial jury." In *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961), this Court explained the meaning of that constitutional phrase.<sup>21</sup> The Court stated that "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors," and a juror's verdict must be based upon "evidence developed at trial." But the Court also noted that

*"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true of criminal cases. To hold*

<sup>21</sup> Although this Court has not expressly incorporated the Sixth Amendment's "impartial jury" requirement into the Fourteenth Amendment's due process clause, the "due process" requirement of the latter amendment appears to be indistinguishable from the Sixth Amendment guarantee. See, *Irvin v. Dowd*, *supra*.

*that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict on the evidence presented in court." Id. (Emphasis supplied.)*

See also, *In re Oliver*, 333 U.S. 257 (1948); *In re Murchison*, 349 U.S. 133, 136 (1955); *Reynolds v. United States*, 98 U.S. 145, 155 (1879).<sup>22</sup> Cf. *Peters v. Kiff*, 401 U.S. 453 (1972). Thus, this Court has cautioned that, when assessing the prejudicial impact of publicity, courts must "distinguish between mere [jurors'] familiarity with [a defendant] or his past and an actual predisposition against him" and between "largely factual publicity [and] that which is invidious or inflammatory." *Murphy v. Florida*, 421 U.S. 794, 800, n.4 (1975). See also, *Beck v. Washington*, 369 U.S. 541, 556 (1962).<sup>23</sup>

To be sure, in a few, extreme instances, this Court, in reviewing a conviction after trial, has presumed prejudice on the part of the jury because of the extraordinary circumstances presented on the record.

<sup>22</sup> See generally, *United States v. Wood*, 299 U.S. 123, 145-46 (1936); *United States v. Burr*, 25 Fed. Cas. 49, 51 (C.C.Va. 1807); Comment, *The Impartial Jury—Twentieth Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial*, 51 Cornell L.Q. 306 (1966).

<sup>23</sup> The Nebraska Supreme Court made no finding that the press coverage of Simant's arrest and subsequent events "was or is even likely to be anything like that referred to in *Sheppard v. Maxwell*," i.e. inflammatory and invidious. Cert. Pet'n Appendix 62a. See, *Sheppard v. Maxwell*, *supra*, 384 U.S. at 361 ("inflammatory publicity" based on misinformation, rumor and accusation occurred after Sheppard's indictment).

*Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). But two of these cases, *Estes* and *Sheppard*, turned on highly unusual situations arising at trial.<sup>24</sup> And convictions were reversed on that basis. Only *Rideau* was concerned solely with pretrial publicity; and that case involved a twenty minute film of the accused's "confession," which was broadcast three times by a television station in the community where the crime and the trial took place. Moreover, the *voir dire* in *Rideau* demonstrated that the jury selected was actually infected with bias. See 373 U.S. at 725-26. As this Court has recently observed, *Estes*, *Sheppard* and *Rideau* "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprive the defendant" of his right to trial by an impartial jury. *Murphy v. Florida*, *supra*, 421 U.S. at 729.

With respect to virtually all claims that a conviction should be overturned because publicity has had a prejudicial impact on the jury, therefore, the "burden of showing essential unfairness [must] be sustained by him who claims such injustice and seeks to have the result set aside, and [must] be sustained not only as a matter of speculation but as a demonstrable reality."

<sup>24</sup> As this Court said in *Murphy v. Florida*, *supra*, 421 U.S. at 799, when explaining the cases in which prejudice was presumed:

"The trial in *Estes* had been conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment. Similarly, *Sheppard* arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival." (Emphasis supplied.)

*United States v. Handy*, 351 U.S. 454, 462 (1956), quoting from *Adams v. United States ex rel. McCann*, 317 U.S. 269, 281 (1942).

**2. Devices for Avoiding a Direct Conflict Between the Press' Constitutional Right to Publish and the Accused's Constitutional Right to Trial by an Impartial Jury.**

A number of techniques exist for reducing the possible prejudice to a criminal defendant from widespread publicity. See generally, American Bar Association, Standards Relating to Fair Trial and Free Press 73-74 (Approved Draft 1968). These procedural safeguards are mediating devices which can be utilized to avoid a direct substantive conflict between the constitutional rights of the press and the constitutional rights of the accused. See also, Note, *Community Hostility and the Right to an Impartial Jury*, 60 Colum.L.Rev. 349 (1960).

This Court has emphasized that there "are many ways to assure the kind of impartial jury that the Fourteenth Amendment guarantees." *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971). As the Court said in *Sheppard v. Maxwell*, *supra*, 384 U.S. at 358, "Since he viewed the news media as his target, the judge never considered *other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial . . .*" (Emphasis supplied.) And as Mr. Justice Powell observed in granting a stay of a Louisiana court order limiting reporting of a trial, "the court has available alternative means for protecting the defendants' rights to a fair trial." *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1308 (1974). (Citations omitted.)



The mediating devices which courts have employed on numerous occasions include the following:

(a) Obviously, a *change of venue* may protect against jury prejudice. *Irvin v. Dowd, supra*; *Sheppard v. Maxwell, supra*, 384 U.S. at 363; Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 Notre Dame Law. 925 (1967).

(b) Similarly, a *change of venire* may be used to ensure impartiality. Note, *Community Hostility and The Right to an Impartial Jury*, 60 Colum.L.Rev. 349, 365-67 (1960).

(c) A *continuance* may reduce the dangers of pre-trial publicity. *Sheppard v. Maxwell, supra*; A. Friendly & R. Goldfarb, *Crime and Publicity* 96-101 (1967). Cf. *Murphy v. Florida, supra*, 421 U.S. at 796.

(d) The *voir dire* examination of prospective jurors is also a powerful tool for counteracting the effects of publicity. *Murphy v. Florida, supra*, 421 U.S. at 800-03; Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan.L.Rev. 545 (1975). If necessary, the *voir dire* can be conducted with individual jurors to provide even greater protection. See, American Bar Association, *Standards Relating to Fair Trial and Free Press* § 3.4 (Approved Draft 1968); Brief of the United States at 64, *United States v. Mitchell, et al.*, Crim. No. 75-1381 (D.C. Cir.) (appeal pending).<sup>25</sup>

(e) *Sequestration* of the jury can also be utilized to avoid prejudice. *Sheppard v. Maxwell, supra*; *Holt v. United States*, 218 U.S. 245, 250 (1910). See, Com-

<sup>25</sup> See also, *Calley v. Callaway*, 519 F.2d 184, 209 (5th Cir. 1975) (*voir dire* in trial of Lieutenant Calley ensured fair trial despite extensive pretrial publicity).

ment, *Sequestration: A Possible Solution to the Free Press-Fair Trial Dilemma*, 23 Am.U.L.Rev. 923 (1974).

(f) *Judicial instructions* may ensure impartiality. A. Friendly & R. Goldfarb, *Crime and Publicity* 106-09 (1967).

(g) *Silence orders* directed at potential witnesses, parties and their lawyers may also protect the rights of the accused. *Sheppard v. Maxwell, supra*; *Calley v. Callaway*, 519 F.2d 184, 212-213 (5th Cir. 1975).

(h) As noted, the *burden of proof* is on the accused to show, as a matter of demonstrable reality, that publicity will have a prejudicial impact on the jury of his peers. See pp. 44-45, *supra*. This procedural requirement, too, mediates between the rights of the accused and the rights of the press.

(i) Finally, *new trials* and *reversals*, though hardly desirable, are always possible if, after careful scrutiny of the complete record of the proceedings and upon mature reflection, a court determines that trial by an impartial jury was denied an accused. *Sheppard v. Maxwell, supra*, 384 U.S. at 363 ("If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception.").

Of course, these various mediating devices may be used in combination to ensure that the accused receives a trial by an impartial jury.



### 3. The Nebraska Supreme Court Failed to Consider Alternatives to the Gag Order on the Press.

The mediating devices listed above constitute important techniques for avoiding an ultimate substantive choice between the free press and fair trial values. They are classic "less drastic means" which can be employed to protect legitimate governmental interests and which do not involve a direct abridgment of the rights guaranteed the press under the First and Fourteenth Amendments. And, as noted, the "less drastic means" principle has been consistently utilized by this Court in the First Amendment area in order to reconcile important values in conflict.<sup>26</sup> *Shelton v. Tucker, supra*; *Carroll v. President & Commissioners of Princess Anne, supra*; *Sherbert v. Werner*, 374 U.S. 398, 407 (1963). See also, *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971).

When First Amendment rights are at issue, government must make a *clear showing* that there is no less drastic means of effecting a permissible governmental purpose before the courts can even consider which of the two competing values should prevail. This rule has been stated by the American Bar Association, Standards Relating to Fair Trial and Free Press 69-70 (Approved Draft 1968): neither direct

<sup>26</sup> Although the principle has been used in many different contexts, the core idea has been summarized as follows:

"... the Court has usually limited its survey of less drastic measures to 'traditional legal methods' and assumed, on the basis of society's long experience with them, that these methods would be reasonably effective, practical and inoffensive ways by which the state could accomplish the ends it claimed to seek." Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464, 472 (1969).

This case, thus, is at the core of the principle, since the alternatives to gagging the press are "traditional legal methods."

restrictions nor use of the contempt power against the press in the criminal trial context should even be considered, as a matter both of sound policy and constitutional law, "in the absence of the *clearest showing that less drastic measures will not achieve the objective.*" (Emphasis supplied.)<sup>27</sup>

In the instant case, the Nebraska Supreme Court did not make a clear showing that less drastic means than a gag order on the press would accomplish the goal of ensuring that the accused was afforded trial by an impartial jury. It did not explore the mediating devices that were available to reduce the effects of pretrial publicity. Indeed, *it did not consider the question at all.*<sup>28</sup>

In sum, eager to resolve a supposed clash between conflicting constitutional values, the high court of Nebraska did not pause to consider the critical threshold question of whether this "clash" could be

<sup>27</sup> As noted, of course, neither the ABA Standards, nor other recommendations from bar and bench, *see*, pp. 34-36, *supra*, approve direct restraints on the press.

"... the Committee does not believe that the present resolution of the problem confronting us lies in direct restrictions on the media. Particularly during the pretrial or post-trial periods, the imposition of restrictions might stifle discussion of important public issues and discourage needed criticism of official conduct." American Bar Association, Standards Relating to Fair Trial and Free Press at 151 (Approved Draft 1968).

See also, American Bar Association Advisory Committee on Fair Trial and Free Press, Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press (Revised Draft, November, 1975) ("... the Committee specifically recommends against the issuance of any orders which would impose direct restraints on the press.")

<sup>28</sup> Nor did the Nebraska District Court even consider the question of whether alternatives to direct restraints on the press would protect the rights of the accused. Cert. Pet'n Appendix 9a-12a.

avoided.<sup>29</sup> This failure to consider less drastic means is enough to condemn the Nebraska Supreme Court's order.<sup>30</sup>

**4. The Alternative Techniques for Protecting the Rights of the Accused are Effective.**

Given the compelling reasons for not allowing prior restraints on press coverage of criminal proceedings, *see* pp. 21-38, *supra*, and given the efficacious alternative techniques available for protecting the rights of the accused, this Court should rule that trial courts shall not impose direct restraints on the press in this context, but should, instead, make use of the established alternatives. *See*, H. Simons & J. Califano, *The Media and The Law* 9 (1976). In so holding, this Court would only be reaffirming the sound constitutional approach for dealing with the "free press-fair trial" issue that it has established in its previous cases, especially, *Rideau v. Louisiana*, *supra*, *Sheppard v. Maxwell*, *supra*, and *Murphy v. Florida*, *supra*.

<sup>29</sup> In somewhat cryptic fashion, the Supreme Court of Nebraska mentions that state law provides for a change of venue to an adjacent county and for trial of an accused within six months from the date charges were filed. But the court does not explicitly consider, let alone hold, that a change of venue or a continuance would not protect the rights of the accused. *See* pp. 55-57, *infra*.

<sup>30</sup> "In the *Sheppard* case and elsewhere, the Supreme Court chided lower courts for failure to use these [alternative] techniques. There are countless other cases, sensational and routine, where the same charge is deserved . . .

"Far too frequently, the fault is not the lack of filtering procedures [i.e. alternative techniques], but the failure to apply them. As Justice Clark made clear, they must be brought into play much more carefully and earnestly. Until they are, the Supreme Court has indicated that it will not consider—nor should it—the more drastic measures against the press that some critical members of the legal profession demand."

A. Friendly & R. Goldfarb, *Crime and Publicity* 248-49 (1967).

In *Rideau*, this Court dealt with pretrial publicity arising out of the televised confession of the accused. The trial court denied Rideau's motion for change of venue, despite the fact that his "confession" to bank robbery, kidnapping and murder had been broadcast three times in the community of 150,000 and had been viewed by tens of thousands of people. 373 U.S. at 724-25. This Court reversed the conviction, holding that "it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later charged." *Id.*, at 726. Although this Court did not face the issue directly, the clear implication of *Rideau* is that a change of venue in such circumstances—which were similar to, but more extreme than, the circumstances in this case—would have protected the right of the accused to trial by an impartial jury.

In *Sheppard*, defendant was the subject of "massive, pervasive and prejudicial publicity that attended his prosecution." 384 U.S. at 335. Not only was there unusual pretrial publicity, including a televised three-day inquest conducted before several hundred spectators in a gymnasium, but at trial the press occupied substantial space within the bar and caused continual disruptions by movement within the courtroom. The unsequestered jury had direct access to news stories. *Id.* This Court criticized the "deluge of publicity" which reached at least some of the jury, *id.* at 357, and deplored the "bedlam" that "reigned at the courthouse during the trial," *id.*, at 355. Yet *despite these excesses*, this Court concluded that it would remain "unwilling to place any direct limitations on the freedom tradi-



tionally exercised by the news media," *id.* at 350, and that the alternative procedures, adumbrated above, "would have been sufficient to guarantee Sheppard a fair trial . . . ,"*id.*, at 358. Thus, even in one of the most extreme cases of prejudicial publicity in this Nation's history, this Court ruled that alternative procedures for protecting the rights of the accused should be utilized by trial courts, that such alternative procedures would be effective and that the imposition of direct restraints on the press' ability to cover criminal proceedings should be avoided.<sup>31</sup>

Last Term in *Murphy v. Florida*, this Court again had occasion to consider the fairness of a trial attended by substantial publicity. And again it concluded that the alternative techniques—in this instance *voir dire*—could assure that a highly-publicized accused would have a trial by an impartial jury. Murphy's arrest for robbery, and subsequent judicial proceedings in the case, received wide news coverage because he had been involved in a notorious jewel theft several years before and because before his trial date on the robbery charges he was indicted for murder. 421 U.S. at 795-6. The events surrounding Murphy's robbery charge thus "drew extensive press coverage . . . [and the] record in this case contains scores of articles reporting on [Murphy's] trials and tribulations . . ." *Id.* Again, despite this pervasive publicity, this Court ruled that *voir dire* was an adequate safeguard to insulate the accused from the publicity which had been prevalent

<sup>31</sup> The Supreme Court of Nebraska wholly misreads *Sheppard*. Cert. Pet'n Appendix 61a-65a. The Nebraska high court totally ignores the various alternatives suggested in *Sheppard* for protecting an accused and then draws the completely unwarranted inference from the case that this Court has sanctioned direct, prior restraints on the press.

in the community less than eight months before the jury was selected in the robbery case. *Id.* at 802-3. And again, this Court did not give even the slightest intimation that a proper remedy in such a case would have been to gag the press. Indeed, by emphasizing the utility of the *voir dire*, this Court indicated how widespread publicity could be accommodated by the criminal process.

The efficacy of the mediating devices has been further underscored by lower federal court holdings in recent trials that have engendered enormous publicity—the prosecution of Lieutenant Calley for the events at My Lai, *Calley v. Callaway*, *supra*, and the prosecution of high government officials for crimes uncovered during the "Watergate" investigations. *See, e.g., United States v. Liddy*, 509 F.2d 428 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 911 (1975); *United States v. Chapin*, 515 F.2d 1274 (1975), *petition for cert. filed*, 44 U.S.L.W. 3150 (U.S. September 12, 1975) (No. 75-401); *United States v. Mitchell*, 389 F. Supp. 917 (D.D.C. 1975), *appeal pending* (D.C. Cir. No. 75-1381). In each of these cases, which, of course, were the subjects of overwhelming public attention, the courts found that the mediating devices could accommodate the press' constitutional right to publish and the accused's constitutional right to trial by an impartial jury. For example, in *Calley*, the Court of Appeals for the Fifth Circuit directed its "focus" to the "post-indictment, pretrial publicity and its impact on [Calley's] trial." 519 F.2d at 205. In finding that there was no prejudice to the accused from the massive pretrial publicity, the Fifth Circuit stated:

"It is not disputed that the military court used most of the means suggested by *Sheppard v. Max-*



well to ameliorate potential prejudice stemming from publicity. The court delayed the proceedings to allow publicity to abate, it allowed extensive voir dire examination to probe for any possible influence on court members by the publicity. The court successfully took great pains to insure that no publicity reached the court members during the trial." *Id.*, at 212.

The Court of Appeals also upheld the military court's decision *not* to restrain the press, in the period before the trial, from publishing statements of witnesses or descriptions of the events at My Lai hamlet: "The military court should not be criticized for refusing to do what was in all probability constitutionally impermissible—controlling or imposing prior restraints on the news media." *Id.* at 213.<sup>32</sup>

In the instant case, the alternatives to a direct restraint on the press would have been equally effective. Put another way, there is no evidence on the record

<sup>32</sup> In *United States v. Liddy*, *supra*, the Court of Appeals for the District of Columbia Circuit ruled that the trial court did not abuse its discretion in declining the defendants' request that all veniremen who had heard anything about the case be examined individually. The trial court had directed general questions to the entire array, followed by individual questioning of those who responded affirmatively to initial inquiries. 509 F.2d at 436.

In *United States v. Chapin*, a similar voir dire was approved. 515 F.2d at 1287. The Court of Appeals upheld the trial court's denial of the accused's motion for change of venue. In both these highly publicized cases, therefore, the trial court did not have to use other techniques available (completely individual voir dire; change of venue) which would have further assured defendants trial by an impartial jury in the face of widespread news coverage.

See also, *United States v. Mitchell*, *supra*, 389 F. Supp. at 920 (trial court deferred consideration of defendants' motions regarding pretrial publicity until after the voir dire and subsequently concluded that "exhaustive" voir dire examination and a continuance assured the accused of a fair trial.)

before this Court that the alternative techniques would not have been effective. To be sure, the press was barred from printing "confessions or admissions against interest" made by the accused to third parties or law enforcement officials and other "information strongly implicative" of guilt. Cert. Pet'n Appendix 64a. But this type of information can hardly be said to be more prejudicial than the *type of information* published or broadcast in *Rideau* or *Sheppard* or *Murphy*, those cases in which this Court has either upheld convictions in the face of widespread publicity or has strongly implied that the traditional alternatives—change of venue, continuance, voir dire, etc.—would have protected the rights of the accused, had the trial court utilized them properly. And it is not possible to say that publication of such information serves no purpose. Not only is it desirable for the public to be generally informed on matters involving the criminal justice system, but even with respect to publication of alleged confessions important interests can be served. For example, publication of a confession may lead to press reports that such a confession was improperly coerced or the confession may implicate other persons whom, but for publicity, the prosecutor might not, for improper reasons, seek to prosecute. The hypotheticals are endless. But that is the point. A direct restraint on the press will cut off the flow of information to the public and by cutting off that flow reduce the benefits, often unpredictable, that an unfettered press has historically brought to the operations of government.

If the type of information restrained here does not justify use of a gag order on the press as opposed to use of the other alternative techniques for protecting the accused, what other factors did the Nebraska Su-

preme Court consider which might justify ignoring the mediating devices?

First, the Nebraska court does mention that state law requires that an accused be tried within six months from the date of the filing of the information, thus implying, although not explicitly considering or holding, that a continuance would not assure trial by an impartial jury. It is important to note that the crime took place in late October, 1975, and that the trial was set for early January, 1976, approximately two and a half months after charges were filed. Thus, the Nebraska courts did not even schedule the trial at the end of the statutorily required period in order to avoid the effects of publicity. In any event, this Court has indicated that a relatively short delay between an arrest, accompanied by massive publicity, and the subsequent trial can ensure a fair trial. *See, Beck v. Washington*, 369 U.S. 541, 556-57 (1962) (9½ months); *Murphy v. Florida*, *supra*, 421 U.S. at 802 (7 months). *See also, Calley v. Callaway*, *supra*, 519 F.2d at 208 (citing cases in which there is relatively short span between arrest, attended by publicity, and trial).

Second, the Nebraska Supreme Court does mention that a change of venue may be had to adjacent counties, but it then notes that the adjacent counties have relatively small populations, again implying, without expressly considering or holding, that a change of venue will not protect the accused. But the Nebraska high court does not analyze why a change of venue to an adjacent county won't provide some safeguard, except to note generally that the "area in which the jury may be selected is served by several radio stations, two television stations and several newspapers in addition to those mentioned." *Cert. Pet'n Appen-*

dix 60a. Nor did the Nebraska Court consider whether the state venue statute would have to give way to the defendant's constitutional right to trial by an impartial jury and whether, therefore, defendant's trial could be moved, if defendant wished, to another more distant and more populous county within the state. *Cf. Irvin v. Dowd*, *supra*, 366 U.S. at 720-21 (suggesting that, but for liberal construction put on state statute that facially limited change of venue in criminal trials, such a statute could be constitutionally infirm).

Third, as noted, neither the Nebraska District Court nor the Nebraska Supreme Court discussed any facts or gave any reason why other techniques for reducing the impact of pretrial publicity, such as voir dire, change of venire or silence orders directed to lawyers, parties and witnesses, would not guarantee the accused an impartial jury.

Thus, there is nothing on this record which suggests that the alternative techniques for protecting the rights of the accused would not be effective in this case. *Amici* thus respectfully submit that this Court should hold that the Nebraska courts violated the Constitution in imposing prior restraints on the press and in not seeking to use the "mediating" devices which this Court has approved as the proper method for accommodating the rights of the press and the rights of the accused.<sup>33</sup>

<sup>33</sup> By imposing a prior restraint on the press, courts would foreclose the possibilities of refining the alternative techniques for protecting the accused from pretrial publicity. Cessation of news coverage would reduce claims of prejudicial pretrial publicity. And thus trial and appellate courts would not have records from which they could continue the process of developing precise rules for deciding the circumstances under which the alternative techniques would provide protection from extensive publicity to an accused.



In the end, the Nebraska Supreme Court has failed to heed the teaching simply but forcefully expressed in *Sheppard*: "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." 384 U.S. at 350. The Nebraska court fails to perceive that the rights of the press and the interests of the accused are, in the long run, not antagonistic, but complementary. It is for this reason that an accommodation of the apparent, immediate conflict between the values at issue through use of alternative techniques must be sought by the trial courts. And it is for this reason, finally, that the Nebraska Court's extreme solution to the free press-fair trial question is unconstitutional.

## II. THE ORDER OF THE NEBRASKA SUPREME COURT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

There is a narrow ground for reversing the order of the Nebraska Supreme Court: its scope is totally irrational, and therefore violates the Equal Protection Clause of the Fourteenth Amendment.

The Nebraska Supreme Court quite correctly held that "courts have no general power in any kind of case to enjoin or restrain 'everybody'. Even when acting with jurisdiction in proper cases orders must pertain to particular persons or legal entities over whom the court has in some manner acquired jurisdiction." App. 57a-58a. Accordingly, the court held a prior restraint in this case could bind only the petitioners and no one else. App. 64a. That consequence is simply irrational.

The only characteristic that is common to the petitioners and distinguishes them from other news media is that they attempted to litigate to protect their

First Amendment rights, which were affected by the original gag order entered by the County Court. Because they tried to intervene in the District Court criminal case, the Nebraska Supreme Court held them bound by its gag order. Other Nebraska media, including the *Omaha Sun*, one of the *amici* herein, were not bound by the gag order, and therefore were free to publish all of the materials which the petitioners were restrained from publishing. The same is true of all of the other *amici* in this case, and indeed, of all the news media in the world, save for the petitioners. The dividing line between the petitioners and the other news media whose publications reached Lincoln County, Nebraska was not drawn pursuant to any rational principle. Even if measured against the full range of constitutionally permissible state interests, it makes no sense at all.

Here, as in *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), "the equal protection claim . . . is closely intertwined with First Amendment interests . . . ." In a series of cases, this Court has held that when the government regulates opportunities to communicate with the public, it must do so in a fair and even-handed manner, and, at the very least, in a rational manner. Where First Amendment interests are at stake, a state may not permit to some what it denies to others. *E.g.*, *Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953); *Cox v. Louisiana*, 379 U.S. 536, 557 (1965); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 510 (1969); *Police Department of the City of Chicago v. Mosley*, *supra*. Even under the "reasonable basis" test used in equal protection analysis of economic classifications,



e.g., *Dandridge v. Williams*, 397 U.S. 471 (1969), the classification made by the Nebraska Supreme Court could not survive: for it is based not on reason, but on happenstance.

Nor can the order be saved under the principle of *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." The rights at stake are First Amendment rights. They can be restricted only by regulations or orders that are narrowly and precisely drawn so as to serve only a compelling state interest by the least restrictive means *E.g.*, *NAACP v. Button*, 371 U.S. 415, 439 (1963); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966). There can be no compelling interest in muzzling some Nebraska news media while leaving others free to report and comment. A restrictive order covering all and only those who asserted their First Amendment rights in court is not precisely drawn.<sup>34</sup> And if it is precisely drawn with that effect in view, it imposes a palpably unconstitutional burden on the assertion of First Amendment rights.

The fact that the Nebraska courts could not reach news media who were not parties in a proceeding before them does not justify their imposing a restraint on those media who happened to be parties. Rather, that fact required the Nebraska courts to refrain from gagging any of the media, and to employ other methods for protecting the interest in a fair trial—methods that

<sup>34</sup> Nor, of course, was the drafting done by a "legislative mind." The order cannot be upheld on the basis of the deference owed to a coordinate branch which has made a political judgment.

would not impose haphazard infringements on First Amendment rights.

### III. THIS CASE IS NOT MOOT, AND SHOULD BE DECIDED ON ITS MERITS.

This Court has consistently recognized that a case does not become moot once a specific controversy between parties has terminated if the controversy is "capable of repetition, yet evading review." *Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911) (decision on the validity of an ICC order after the order had expired); *Roe v. Wade*, 410 U.S. 113 (1973) (decision on constitutionality of anti-abortion statute after termination of petitioner's pregnancy); *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (decision on constitutionality of registration requirement after petitioner had satisfied the requirement); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968) (decision on constitutionality of injunction after it had expired).

Under the "capable of repetition, yet evading review" standard, immediate review of the gag order in this case is required even though the order has expired. The constitutional questions presented by this gag order are not unique to this case, for numerous other orders restricting press publication of information during pre-trial and trial proceedings have been issued by a variety of courts in recent years, including courts in Washington,<sup>35</sup> California,<sup>36</sup> Florida,<sup>37</sup> Louisi-

<sup>35</sup> *State v. Sperry*, 79 Wash. 2d 69, 483 P.2d 608, cert. denied sub. nom. *McCrea v. Sperry*, 401 U.S. 939 (1971).

<sup>36</sup> *Sun Co. of Bernadino v. Superior Court*, 29 Cal. App. 3rd 815, 105 Cal. Rptr. 873 (1973).

<sup>37</sup> *State ex rel. Miami Herald Pub. Co. v. McIntosh*, 320 So. 2d 861 (Fla. Dist. Ct. App. 1975), cert. granted, 322 So. 2d 544 (Fla. 1975).

ana,<sup>38</sup> Pennsylvania,<sup>39</sup> New York,<sup>40</sup> Indiana,<sup>41</sup> Arkansas,<sup>42</sup> and Maine.<sup>43</sup> In addition, a Virginia court has imposed a criminal conviction on a newspaper under a statute imposing a prior restraint on news reports concerning the Virginia Judicial Review Commission.<sup>44</sup>

Since gag orders directed against the press are generally applicable only during pre-trial or trial proceedings, and such proceedings often last only a few days or weeks and only rarely last more than a few months, Supreme Court review of a gag order still in effect is virtually impossible. For example, the four gag orders in the *Simants* case remained in effect for a total period of less than three months, thus effectively prohibiting Supreme Court review of the orders while they remained in force.<sup>45</sup> Under the Circumstances, it is imperative that this Court review the constitutionality of this gag order even though the order has expired.

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<sup>38</sup> *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301 (1974).

<sup>39</sup> *United States v. Schiavo*, Nos. 73-1855 and 73-1856 (3rd Cir., Aug. 8, 1974).

<sup>40</sup> *Oliver v. Postel*, 30 N.Y. 2d 171, 331 N.Y.S. 2d 407, 282 N.E. 2d 306 (1972); *People v. Carson*, New York Times, Jan. 16, 1976, p. 1, cols. 6-7.

<sup>41</sup> *State v. Dauber*, No. 6855 (Marshall Cir. Ct., Ind., April 11, 1973).

<sup>42</sup> *Wood v. Goodson*, 485 S.W. 2d 213 (Ark. 1972).

<sup>43</sup> See Brunswick, Maine *Times Record*, April 23, 1973.

<sup>44</sup> *The Washington Post*, Jan. 16, 1976, at C1, col. 7-8.

<sup>45</sup> See also *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301 (1974) (Powell, J., in chambers), dismissed as moot, 420 U.S. 985 (1975).

Two additional reasons support immediate review of this order. At present there is a state of mass confusion as to the constitutionality of such orders. For example, the three Nebraska courts that passed constitutional judgment on gag orders in the *Simants* case reached three different conclusions, and when presented with a stay application, Mr. Justice Blackmun reached yet a fourth conclusion. Moreover, every time the gag orders in this case were reviewed, their scope was cut down. The history of this case thus illustrates the need for appellate review to protect First Amendment rights.

Elsewhere in the country, courts are imposing a startling array of gag orders directed against the news media, including such actions as excluding the press from reporting public pre-trial judicial proceedings,<sup>46</sup> barring publication for six months of the names of public witnesses,<sup>47</sup> forbidding publication of an opinion as to guilt or innocence,<sup>48</sup> limiting news media coverage to a single pool reporter,<sup>49</sup> banning publication of a public jury verdict,<sup>50</sup> and requiring reporters to sign an agreement not to report certain portions of public court proceedings as a condition for admittance into the courtroom.<sup>51</sup> In view of the number, variety, severity, and short-term nature of gag orders, constitutional guidance from this Court is sorely needed.

---

<sup>46</sup> *State v. Sperry*, *supra*.

<sup>47</sup> *Sun Co. of Bernadino v. Superior Court*, *supra*.

<sup>48</sup> *People v. Green*, Nos. L 2814F through L 28150 (Mun. Ct. of San Francisco, Dept. 19, May 9, 1974).

<sup>49</sup> *State v. Dauber*, *supra*.

<sup>50</sup> *Wood v. Goodson*, *supra*.

<sup>51</sup> See Brunswick Maine *Times Record*, April 23, 1973.



Second, the urgent need for immediate review of gag orders directed against the press is exacerbated because such orders place First Amendment rights in serious jeopardy. Unless this Court rules on the constitutionality of such orders, there is a substantial likelihood that trial courts will issue gag orders in the future which violate the First Amendment rights of the press and the public. Under the rule set forth by this Court in *Walker v. Birmingham*, 388 U.S. 307 (1967), a party may not disobey an unconstitutional court order, but must obey it pending appeal. The implication is that even violation of an unconstitutional court order and a contempt conviction would not preserve for appellate review the question of the validity of the original order. Indeed, the Fifth Circuit has held that violation of a gag order is an adequate ground for sustaining the conviction of a reporter even though the gag order itself could not "withstand the mildest breeze emanating from the Constitution." *United States v. Dickinson*, 465 F.2d 496, 500, 509-14 (5th Cir. 1972), 476 F.2d 373 (5th Cir.), cert. denied, 414 U.S. 979 (1973). Thus, the *only* way this Court is likely to be able to rule on the constitutionality of direct prior restraints on the press in the context of criminal trials is in circumstances like those presented here. *Pacific Terminal* and its progeny provide ample precedent for deciding this case on its merits. The character of the rights at stake and the clear need for guidance from this Court fully justify following that precedent here.

### CONCLUSION

For nearly 200 years—through civil and global wars, economic depression and domestic violence—this Nation has struggled and risen to be the world's greatest

democracy, without any judicially imposed prior restraints on news reporting.

For nearly 200 years this Nation has lived its profound belief and unwavering conviction that prior restraints on news reporting are anathema to the First Amendment to the Constitution. There have been occasions when mayors and governors, private and public interests, generals and admirals, diplomats and intelligence agents, judges and presidents, have attempted in one way or another to block publication of particular facts. On those occasions when such attempts have been subjected to constitutional scrutiny, without exception they have been struck down in the face of the First Amendment. On many occasions, this Court has reminded all of us that prior restraints on news reporting are incompatible with the First Amendment to our Constitution.

For nearly 200 years the rights protected by the First and Sixth Amendments have flourished in congenial constitutional brotherhood. Neither Amendment has been used to diminish the power and majesty of the other. Notorious trials and bizarre murders are part of the public and contemporaneous history of our Nation, while secret trials and hidden torture are part of the underground history of totalitarian states.

There are indeed problems with the criminal justice system in America. Crime continues its ugly and mean rise; the vast majority of perpetrators of criminal acts go unapprehended. Police sometimes abuse the citizens and at others are abused by them. Courts are overwhelmed and judges are underpaid. But none of these problems are caused by the absence of prior restraints. Indeed some of the most severe problems of our crim-



inal justice system, such as the inadequacies of our prisons and the corruption of too many state and local judges, prosecutors and lawyers, persist because the cleansing light of press coverage has not yet illuminated them for public attention.

For nearly 200 years there have been fair and public trials in these United States, with no prior restraints. Indeed, one essence of a fair trial has been the constitutional mandate that trials be public.

This is no time in our history for this or any other court to discard two centuries of experience and cast aside one of the most precious rights guaranteed by the First Amendment.

For the foregoing reasons the judgment of the Supreme Court of Nebraska should be reversed.

Respectfully submitted,

JOSEPH A. CALIFANO, JR.  
JOHN G. KESTER  
RICHARD M. COOPER  
JOHN B. KUHN  
BENJAMIN W. HEINEMAN, JR.  
WILLIAMS, CONNOLLY & CALIFANO  
1000 Hill Building  
Washington, D. C. 20006  
(202) 331-5000  
*Attorneys for Amici Curiae*

*Of Counsel:*

ALAN R. FINBERG, Esq.  
VICE PRESIDENT, SECRETARY  
AND GENERAL COUNSEL  
THE WASHINGTON POST COMPANY  
444 Madison Avenue  
New York, New York 10022  
*Attorney for The  
Washington Post Company*  
ROBERT C. LOBDELL, Esq.  
VICE PRESIDENT AND  
GENERAL COUNSEL  
LOS ANGELES TIMES  
Times Mirror Square  
Los Angeles, California 90053  
*Attorney for The Times  
Mirror Company*  
DAVID R. HARDY, Esq.  
SHOOK, HARDY & BACON  
915 Grand Avenue  
Kansas City, Missouri 64106  
*Attorney for The  
Kansas City Star Company*  
NORTON L. ARMOUR, Esq.  
GENERAL COUNSEL AND  
SECRETARY  
MINNEAPOLIS STAR AND  
TRIBUNE COMPANY  
Minneapolis, Minnesota 55415  
*Attorney for Minneapolis  
Star and Tribune Company*  
BRUCE W. SANFORD, Esq.  
BAKER, HOSTETLER &  
PATTERSON  
Union Commerce Building  
Cleveland, Ohio 44115  
*Attorney for The Denver  
Publishing Company*  
JOSIAH L. NEEPER, Esq.  
GRAY, CARY, AMES & FRYE  
2100 Union Bank Building  
San Diego, California 92101  
*Attorney for The Copley  
Press, Inc.*

SAM ANTAR, Esq.  
GENERAL ATTORNEY  
AMERICAN BROADCASTING  
COMPANIES, INC.  
1330 Avenue of the Americas  
New York, New York  
*Attorney for American  
Broadcasting Companies, Inc.*  
DAN PAUL, Esq.  
PAUL & THOMPSON  
1300 Southeast First National  
Bank Building  
Miami, Florida 33131  
*Attorney for The Miami  
Herald Publishing Company*  
JAMES A. CROWTHER, Esq.  
VICE PRESIDENT AND  
GENERAL COUNSEL  
THE HOUSTON POST  
4747 Southwest Freeway  
Houston, Texas 77001  
*Attorney for The  
Houston Post Company*  
GARY G. GERLACH, Esq.  
SECRETARY AND GENERAL  
COUNSEL  
DES MOINES REGISTER AND  
TRIBUNE  
Des Moines, Iowa 50304  
*Attorney for Des Moines  
Register and Tribune  
Company*  
EDGAR A. ZINGMAN, Esq.  
WYATT, GRAFTON & SLOSS  
28th Floor  
Citizens Plaza  
Louisville, Kentucky 40202  
*Attorney for The Courier-  
Journal and Louisville Times  
Company*  
DONALD B. HOLBROOK, Esq.  
JONES, WALDO, HOLBROOK &  
McDONOUGH  
800 Walker Bank Building  
Salt Lake City, Utah 84111  
*Attorney for Kearns Tribune  
Corporation*

**Certificate of Service**

I hereby certify that three printed copies of the foregoing Brief for The Washington Post Company, *et al.*, *Amici Curiae*, were mailed, first class mail, postage prepaid, this 26th day of January, 1976 to each of the following:

James L. Koley, Esq.  
McGill, Koley & Parsonage, P.C.  
Suite 300  
10010 Regency Circle  
Omaha, Nebraska 68114  
Attorney for Petitioners

Harold Mosher, Esq.  
Assistant Attorney General  
Department of Justice  
State of Nebraska  
State Capitol  
Lincoln, Nebraska 68509  
Attorney for Respondent

Milton R. Larson, Esq.  
County Attorney  
Lincoln County Courthouse  
North Platte, Nebraska 69101

Leonard P. Vyhnalek  
Beatty, Morgan & Vyhnalek  
Beatty Building  
P.O. Box 548  
212 North Dewey Street  
North Platte, Nebraska 69101  
Attorney for Erwin Simants

/s/ RICHARD M. COOPER  
Richard M. Cooper

# APPENDIX

1a

**Appendix**

LAW OFFICES  
MCGILL, KOLEY & PARSONAGE, P. C.  
Suite 300  
10010 Regency Circle  
Omaha, Nebraska 68114  
(402) 397-9988

January 7, 1976

Mr. Richard M. Cooper  
Williams, Connolly & Califano  
1000 Hill Building  
Washington, D. C. 20006

Dear Mr. Cooper:

In response to your letter of January 2, 1976 to Stephen T. McGill of this law firm, please be advised that you have our consent to your filing an amicus brief on behalf of a group of news media, including The Washington Post, in the United States Supreme Court in *Nebraska Press Association v. Stuart*, No. 75-817. We also consent to having the amicus brief filed no later than January 26, 1976.

Yours very truly,

/s/ JAMES L. KOLEY  
James L. Koley

JLK:jh



DEPARTMENT OF JUSTICE  
STATE OF NEBRASKA  
State Capitol  
Lincoln, Nebraska 68509  
402/471-2682

January 6, 1976

Richard M. Cooper, Esq.  
Williams, Connolly & Califano  
1000 Hill Building  
Washington, D. C. 20006

Dear Mr. Cooper:

This will acknowledge my receipt of your letter of 2 January 1976 wherein you request my permission to file an *amicus* brief in the United States Supreme Court in the case of *Nebraska Press Ass'n v. Stuart*, No. 75-817.

I hereby grant your request and consent to your filing in the above cited case an *amicus* brief pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States.

Very truly yours,

PAUL L. DOUGLAS  
*Attorney General*  
/s/ HAROLD MOSHER  
Harold Mosher  
*Assistant Attorney General*

HM:saa

MILTON R. LARSON  
LINCOLN COUNTY ATTORNEY  
LINCOLN COUNTY COURTHOUSE  
North Platte, Nebraska 69101  
Phone 534-4350, Ext. 270

January 14, 1976

Williams, Connolly & Califano  
1000 Hill Building  
Washington, D.C. 20006

RE: Nebraska Press Ass'n v. Stuart No. 75-817

Attention: Mr. Richard M. Cooper

Dear Mr. Cooper:

This will acknowledge receipt of your correspondence under date of January 2, 1976. I take this opportunity to apologize for the delay in my response.

On behalf of the State of Nebraska, I hereby consent to the filing of an *amicus* brief on behalf of a group of news media, including The Washington Post, in the above-captioned action, and that the same should be filed not later than January 26, 1976.

Very truly yours,

/s/ MILTON R. LARSON  
Milton R. Larson  
*County Attorney*

MRL:sj

4a

BEATTY, MORGAN & VYHNALEK  
ATTORNEYS AT LAW  
Beatty Building—Post Office Box 548  
212 North Dewey Street  
North Platte, Nebraska 69101  
Area Code 308—Phone 532-5090

20 January 1976

Williams, Connolly, & Califano  
Attorneys at Law  
1000 Hill Building  
Washington, D. C. 20006  
Attention: Richard M. Cooper

RE: Nebraska Press Assn v. Stuart  
No. 75-817

Dear Mr. Cooper:

Enclosed is your letter of January 2, 1976 showing our signature for consent to file a brief *amicus curiae*.

Very truly yours,

BEATTY, MORGAN & VYHNALEK  
By /s/ LEONARD P. VYHNALEK  
Leonard P. Vyhnalek

7/he  
Enc

5a

LAW OFFICES  
WILLIAMS, CONNOLLY & CALIFANO  
1000 Hill Building  
Washington, D. C. 20006  
Area Code 202—331-5000

January 2, 1976

Leonard P. Vyhnalek  
820 West First Street  
North Platte, Nebraska 69101

Dear Mr. Vynhalek:

Pursuant to our telephone conversation, I am writing to ask your consent to our filing an *amicus* brief on behalf of a group of news media, including *The Washington Post*, in the United States Supreme Court in *Nebraska Press Ass'n v. Stuart*, No. 75-817. I would further request that you consent to have the *amicus* brief filed not later than January 26, 1976, which is 45 days after the granting of certiorari by the Court on December 12.

If you do consent as requested in this latter, please so indicate by signing below.

Thank you for your consideration.

Sincerely,

/s/ RICHARD M. COOPER  
Richard M. Cooper

RMC:dmr

Consent granted as requested:

/s/ LEONARD P. VYHNALEK  
Leonard P. Vyhnalek

IN THE  
**Supreme Court of the United States** 1976

OCTOBER TERM, 1975

**No. 75-817**

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD  
COMPANY; THE JOURNAL-STAR PRINTING CO.;  
WESTERN PUBLISHING CO.; NORTH PLATTE BROAD-  
CASTING CO.; NEBRASKA BROADCASTERS ASSOCIA-  
TION; ASSOCIATED PRESS; UNITED PRESS INTER-  
NATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF  
THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA  
DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICH-  
OLLS; JAMES HUTTENMAIER; WILLIAM EDDY;  
*Petitioners,*

**v.**

THE HONORABLE HUGH STUART, JUDGE, District Court  
of Lincoln County, Nebraska, *et al.*  
*Respondents.*

On Writ of Certiorari to the Supreme Court of the  
State of Nebraska

**BRIEF AMICUS CURIAE  
OF  
AMERICAN NEWSPAPER PUBLISHERS  
ASSOCIATION**

ARTHUR B. HANSON  
FRANK M. NORTHAM  
MITCHELL W. DALE  
HANSON, O'BRIEN, BIRNEY, STICKLE  
AND BUTLER  
888 Seventeenth St. N.W.,  
Washington, D.C. 20006

*Attorneys for Amicus Curiae,  
American Newspaper  
Publishers Association*



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1975

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No. 75-817

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NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-HERALD  
COMPANY; THE JOURNAL-STAR PRINTING CO.;  
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NATIONAL; NEBRASKA PROFESSIONAL CHAPTER OF  
THE SOCIETY OF PROFESSIONAL JOURNALISTS/SIGMA  
DELTA CHI; KILEY ARMSTRONG; EDWARD C. NICH-  
OLLS; JAMES HUTTENMAIER; WILLIAM EDDY;  
*Petitioners,*

v.

THE HONORABLE HUGH STUART, JUDGE, District Court  
of Lincoln County, Nebraska, *et al.*  
*Respondents.*

---

On Writ of Certiorari to the Supreme Court of the  
State of Nebraska

---

BRIEF AMICUS CURIAE  
OF  
AMERICAN NEWSPAPER PUBLISHERS  
ASSOCIATION

---



### PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this brief amicus curiae in support of Petitioners, Nebraska Press Association, Omaha World-Herald Company, The Journal-Star Printing Co., Western Publishing Co., North Platte Broadcasting Co., Nebraska Broadcasters Association, Associated Press, United Press International, Nebraska Professional Chapter of the Society of Professional Journalists/Sigma Delta Chi, Kiley Armstrong, Edward C. Nicholls, James Huttenmaier and William Eddy. All parties to this suit have given their written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

### INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,140 newspapers representing over ninety-percent of the total daily and Sunday newspaper circulation in the United States. A recent by-law change has allowed an increasing number of non-daily newspapers to join ANPA.

The Omaha World-Herald Company, publisher of the World-Herald, The Journal-Star Printing Co., publisher of the Lincoln Star and Journal and the Western Publishing Company, publisher of the North Platte Telegraph, along with five other daily newspapers in the State of Nebraska, hold membership in ANPA.

Concerned with matters of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members abreast of matters touching on these concerns. In that regard, the Association's member newspapers, individually and through ANPA, are ever vigilant to protect the public's right, under the First Amendment, to information concerning the activities of government and matters of public interest. ANPA and its members are vitally interested in protecting and maintaining the primary function of newspapers: the gathering of information for dissemination to the people. To insure the free and uncensored flow of information to the public, daily newspapers and their employees must be free to report happenings in their communities, particularly events taking place in the courtroom, without censorship and "gag" orders.

It is most respectfully and emphatically called to this Court's attention that the Sixth Amendment to the Constitution of the United States calls for " \* \* \* a speedy and public trial, by an impartial jury \* \* \* ". The rights granted the press in the First Amendment, no differently than the rights granted an accused under the Sixth Amendment, are not solely the right of the press or of the accused. They are rights of the citizenry. In each instance they are integral parts of the warp and woof of our democratic system of government so ably established initially in 1781, and enhanced by the adoption of the Bill of Rights in 1789. Each of these rights inherently belong to all the people of our country, and each, within the constitutional framework, must relate one to the other in accord with the fact situations surrounding cases as they arise in the courts, as in this instance.

The censorious judgments entered by Judge Stuart in the trial of Erwin Charles Simants in the District Court of Lincoln County, Nebraska and supported in part by Justice Blackmun of this Court and, in turn, by the Supreme Court of Nebraska, represent in ANPA's view clear abrogations of the First Amendment without concurrent justification in this case of any asserted Sixth Amendment rights of the defendant Simants.

Accordingly, we ask this Court to establish herewith a rule of law which can, for the foreseeable future, delineate not some supposed conflict between the First and Sixth Amendments, but rather the co-equal compatibility and mutually supportive nature that these two great instruments of our Bill of Rights were intended to have by those wise draftsmen in 1789.

We attach as Appendix A to this brief the foreword and the report of the ANPA Special Committee on Free Press and Fair Trial which was published in 1967. As Appendix B, we attach the proposals of James Madison, the architect of the Bill of Rights; the proposals made by the House Committee; the proposals sent from the House to the Senate; and the proposals sent from the Senate to the States which eventuated in Articles Third through Twelve being adopted by the States and becoming the Bill of Rights as we know it today, namely the first ten amendments to our Constitution.<sup>1</sup>

<sup>1</sup> As Appendices C and D to this brief, we attach the studies made in support of the Report of the ANPA Committee on Free Press and Fair Trial.

## QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF THE CASE

We adopt the questions presented, constitutional provisions involved and statement of the case, all as set forth in the petitioner's brief.

## ARGUMENT

The Court's willingness to address itself to the question at hand is of great significance. No case, since Justice Marshall decided *Marbury v. Madison*,<sup>2</sup> could require greater soul-searching or result in a more important decision for the people of this Republic than the decision that this Court must render in this instance.

In an effort to be of assistance, we shall briefly re-cite the historical perspective of the press in this country from colonial times to date so as to lay a foundation from which the Court may reach what we believe to be the right decision and the right guidance for future generations. Too often we neglect history, feeling that what is happening today is brand new and has not been contemplated in the past.

As prologue we would remind the Court that nowhere in the world are people free without a free press and a free judiciary, each able to operate under rules of law guiding both. The history of Nazi Germany reminds us that the first right of the Weimar Republic's people which Hitler destroyed was that of press freedom. And, shortly after the destruction of a free press in Germany, that Republic's independent judicial system also was subverted and destroyed by appointment of Hitler supporters to the bench.

<sup>2</sup> 1 Cranch 137 (1803).

Who can forget the demise of *La Prensa* and the free press of Argentina concurrent with the rise of Juan Peron. And, again in that Republic, the subsequent destruction of the judicial system left protest impossible.

Our memories would be short indeed, if we did not sadly note how India, once looked upon as a progressing democracy in Asia, first censored and gagged its press and then cowed its judiciary into upholding government excesses by Indira Ghandi. To this very day the Indian press is controlled by the government, and the judiciary is controlled by the Executive.

It can be truly said that absent the "Fourth Estate" the Executive Branch of Government, in the form of dictatorship of whatever kind, inevitably overwhelms both the judicial and legislative branches in whatever form they may be created in a given country.

Now let us go to the founding of our nation. In colonial times the greater portion of our heritage stemmed from England. That heritage was the predominant force in the colonization of our original thirteen states. England itself was emerging into a freer society as a result of the Magna Carta, the statutes of Elizabeth and other efforts by the English people to gain greater freedom to express themselves and to develop a parliamentary democracy. Yet, many of the colonists came to this country to avoid submission to either religious or political repression, debtor's prison or some in search of wealth.

It must be remembered that in the earlier days of our nation the predominant influences were those of the merchants and the Anglican Church. The earliest colleges in America were founded by churchmen sup-

ported by merchants from England in Massachusetts and Virginia. This influence thus was of the utmost importance in establishing our approach to the common law and to the beginning application of same in this country.

The first formal law school in England was established at Oxford no earlier than the 1740's by William Blackstone, the Vinerian professor of law at Oxford. Contemporaneously in 1750, George Wythe, the first professor of law in America, began the teaching of men such as Thomas Jefferson, John Marshall, Bushrod Washington, and other greats such as Madison, Tyler and Mason in Williamsburg, Virginia.

Why such heavy emphasis on Virginia? In 1776 when the Declaration of Independence was adopted, Virginia ranked number one in population in our country. Pennsylvania was number two, more than 200,000 short of Virginia, and New York ranked but fifth with Massachusetts third and North Carolina fourth in the order of population. Little Maryland ranked sixth, just 3,000 behind New York. Thus the heavy emphasis on the development of our Declaration and our original Constitution and our Bill of Rights stemmed from what was then the center of population in America.<sup>3</sup>

<sup>3</sup> Populations of the thirteen original states at the time of the Declaration of Independence (1776).

|                |         |                |         |
|----------------|---------|----------------|---------|
| Virginia       | 567,614 | Connecticut    | 209,149 |
| Pennsylvania   | 360,000 | South Carolina | 200,000 |
| Massachusetts  | 357,511 | New Jersey     | 140,435 |
| North Carolina | 270,000 | New Hampshire  | 102,000 |
| New York       | 257,786 | Georgia        | 90,000  |
| Maryland       | 254,050 | Rhode Island   | 51,896  |
|                |         | Delaware       | 37,000  |



As a part of the British colonial empire, the early American colonies imposed the same sort of domestic press control as did the motherland. In colonial days, American judges and governors were appointed by the Crown, and were generally Tories. They were under great pressure to faithfully implement the Royal will. On February 21, 1682, the Royal Governor of the Colony of Virginia and his Council called John Buchner before them to answer charges that he had printed the Laws of 1680 "without his Excellency's license." Buchner was found guilty and was ordered "to enter into bond in 100 pounds not to print anything thereafter until His Majesty's pleasure should be known."<sup>4</sup>

In 1683, the new governor of Virginia issued an order that no person be allowed to operate a printing press "on any occasion whatsoever."<sup>5</sup> This order lasted, and stopped printing in Virginia, for fifty years.

Government repression of this sort also was evident forty years later in Massachusetts. On August 21, 1721, James Franklin, the brother of Benjamin Franklin, began to print in Boston, America's fourth newspaper, the *New England Courant*.<sup>6</sup> In the second month of publication, comments were made in the *Courant* which offended the Colonial Assembly. James Franklin was arrested, censured and jailed for one month.

<sup>4</sup> DOUGLAS, ALMANAC OF LIBERTY (Doubleday, Garden City, N.Y., 1954) p. 244.

<sup>5</sup> *Ibid.*

<sup>6</sup> DOUGLAS, *supra*, note 4, at 52 (The First American newspaper was the *Boston News Letter*, April 24, 1704; the second, the *Boston Gazette*, December 21, 1719; the third the *American Weekly Mercury* of Philadelphia, Dec. 22, 1719).

When James was released from jail, he was ordered by the Colonial Assembly to "no longer print the paper called the *New England Courant*."<sup>7</sup> To evade this decree, the paper was published for several months under the name of Benjamin Franklin, before personal differences split the brothers and took Benjamin to New York. The *New England Courant* was the first American newspaper to be critical of the colonial regime; and the regime acted quickly to suppress it.

The seditious libel trial of John Peter Zenger<sup>8</sup> held in New York in 1735 marked the first serious departure from the British approach in addressing the press, by establishing truth as a defense to seditious libel.

Upon the 1776 adoption of the Constitutions of Virginia, Pennsylvania and Maryland, sections were included granting freedom of the press.<sup>9</sup> Massachusetts and Delaware enacted similar clauses in their constitutions in 1780 and 1782 respectively.<sup>10</sup>

The Virginia resolution of independence written prior to the adoption of that State's constitution contains the following statement: "the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained by any despotick government."<sup>11</sup>

<sup>7</sup> DOUGLAS, *supra*, note 4, at 52.

<sup>8</sup> 17 Howells State Trials 675 (1735).

<sup>9</sup> RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1794, 78.

<sup>10</sup> *Ibid.*

<sup>11</sup> Virginia Declaration of Rights adopted June 12, 1776.

After the Revolution and the adoption of the Bill of Rights in 1789, the press remained essentially in its same form until the Nineteenth century, and, in fact, until after the War of 1812. Then, however, as the country began to expand westward and as small centers of population developed, the political press of the Nineteenth century came into being.

When we today begin to consider the criticism currently directed at the press for its extensive coverage of public figures in both their public and personal lives, we must recognize that these are but dim shadows of the public satire directed at Thomas Jefferson and his alleged mistress and progeny thereby; Andrew Jackson's pipe smoking, hillbilly wife; Abraham Lincoln's warty nose and supposed uncouth language; and Ulysses Grant's drunkenness, to cite only a few examples. Put mildly, the political press of the Nineteenth century was colorful, vigorous, hard-hitting and highly prejudiced, yet free, ungagged and uncensored.

Where were the lawsuits? We would respectfully suggest to the Court that it was not until the emergence of certain union trials in the Twentieth century, evolving out of the Espionage Acts during and immediately subsequent to World War I, that we began really to involve ourselves in questions of free speech and free press.

It wasn't until *Near v. Minnesota*<sup>12</sup> in 1930 that a great prior restraint case came on the scene. Who did this involve; a racially prejudiced scandal monger in the Midwest.

Once again, we must remember that our country has grown from its original population of slightly in ex-

<sup>12</sup> 283 U.S. 697 (1930).

cess of 2,800,000 at the time of the Revolution to more than 215,000,000 today. The speed of communication and immediate access to events has pressured a flood of information into the public arena such as has never been seen before.

All of these things tend to make one more conscious of the impact of the press. Yet who can truly judge its impact, and what studies show that it has impacted on juries so as to influence the judgment of intelligent persons in their addressing the facts of a given criminal case?

Following now, we address ourselves to the specific questions raised by the petitioners in their petition and brief and update the Court as to our views on the most recent cases since 1967 and, in so doing, call specifically to your attention words uttered by the late, great Justice Louis D. Brandeis:

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."<sup>13</sup>

and words from Winston Churchill:

<sup>13</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting).

"A free press is the unsleeping guardian of every other right that freemen prize; it is the most dangerous foe of tyranny . . . Under dictatorship the press is bound to languish, and the loudspeaker and the film to become more important. But where free institutions are indigenous to the soil and men have the habit of liberty, the press will continue to be the Fourth Estate, the vigilant guardian of the rights of the ordinary citizen."<sup>14</sup>

and again, words from the late Justice Felix Frankfurter:

"A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press."<sup>15</sup>

All to the effect, in final essence, that no steps should be taken to reduce the ability of the press to report in timely fashion to the public which it represents, those human events no matter how sad, perverted, or brutal, so that the public may be better informed as to how to deal with such events in the future.

As the late great Judge Learned Hand said:

The first amendment ". . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and al-

<sup>14</sup> Speech delivered March 5, 1946, at Fulton, Missouri.

<sup>15</sup> *Pennkamp v. Florida*, 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring).

ways will be folly; but we have staked upon it our all."<sup>16</sup>

#### THE PRESS MAY NOT BE PROHIBITED FROM PUBLISHING INFORMATION REVEALED IN PUBLIC COURT PROCEEDINGS OR RECORDS CONCERNING PENDING JUDICIAL PROCEEDINGS

The very statement of the issue, as to whether an injunction may issue prohibiting publication by the press of information revealed in *public* court proceedings and *public* records about pending judicial proceedings, answers itself. For what else is the press than the public's representative for the receipt and transmission of information? As indicated previously, ANPA believes that the primary function of newspapers is the gathering of information for dissemination to the public. The drafters and supporters of the First Amendment firmly believed that it was imperative to the operation of the Republic which they envisioned that the people be informed as to the operations of government, including the judicial branch thereof. To that end they provided that no law should be made which abridged the freedom of the press, recognizing that only a free press could effectively keep the public so informed.

The First Amendment provides to the press an absolute guarantee of freedom to publish any and all information without prior restraint; similarly, it serves as a guarantee to the people of our nation that they will have such information available to them in timely fashion, "information to which the public is entitled in virtue of the constitutional guaranties."

<sup>16</sup> *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D. N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).



*Grosjean v. American Press Co.*, 297 U.S. 233 (1935). In colonial times, and even more so in today's world, no individual could discover and learn all that goes on about him, even if limited to only events of great significance. Therefore, the press was accorded the responsibility, along with the freedom to accomplish the task, of gathering and disseminating information which might be of interest and importance to the public.

It has never been held that, in carrying out this responsibility, the press has any lesser right than the public to seek out information and report its discoveries. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), this Court recognized that news gathering qualified for First Amendment protection, for "without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. at 707. Moreover, "the First and Fourteenth Amendments also protect the right of the public to receive such information and ideas as are published." *Pell v. Procunier*, 417 U.S. 817 at 832 (1974), citing, *Kliendienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). In *Pell v. Procunier*, *supra*, this Court did uphold prison regulations which restricted access of the press to prisoners for the purposes of conducting interviews, but the Court was careful to note that the regulations did "not deny the press access to sources of information available to members of the general public." 417 U.S. at 835.

With respect to court proceedings and court records, this Court has made it quite clear that the press has a right, and responsibility, to publish the information contained therein:

Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection.

*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L.Ed. 2d 328, 349-50 (1975). In *Estes v. Texas*, while overturning the petitioner's conviction on the grounds that televising his trial had resulted in a denial of due process, this Court reiterated its oft-stated position that the press may not be subjected to any sanction for reporting or commenting on that which takes place in a trial:

[Reporters] are plainly free to report whatever occurs in open court through their respective media. This was settled in *Bridges v. California*, 314 U.S. 252 (1941), and *Pennekamp v. Florida*, 328 U.S. 331 (1946), which we reaffirm.

381 U.S. 532, 542 (1965).

This Court has had occasion to overturn criminal convictions based on its conclusions that press coverage, among other factors, had prevented the defendants from receiving "fair" trials. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1964) ("carnival atmosphere"); *Irvin v. Dowd*, 366 U.S. 717 (1961) ("inherent prejudice"); but see, *Murphy v. Florida*, —

U.S. —, 44 L.Ed. 2d 589 (1975) (press coverage alone not sufficient to raise presumption of denial of due process). In none of the cases in this category, however, has the Court stated or even implied that it would be proper to prohibit the press from reporting on pretrial or trial proceedings or from reporting information concerning the crime or the accused.

The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.

*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L.Ed. 2d 328, 348 (1975).

All of the foregoing would seem to leave no doubt as to the invalidity of the decision of the Supreme Court of Nebraska insofar as it upholds the order of the District Court regarding publication of information revealed in the court proceedings and records. Part of the arraignment hearing and all of the preliminary hearing of Simants were open to the press and the public; yet the District Court's "gag" order, as modified by the Supreme Court of Nebraska, attempts to prohibit the publication by the press and dissemination by the press or public of certain information revealed in the evidence and testimony presented at those hearings.

ANPA contends that the only standards applicable to court proceedings of any nature, whether pretrial or post-trial, are the normal standards of courtroom decorum requiring the appropriate maintenance of good order and discipline in the conduct of these matters for the benefit of all. Thus, neither the public nor

the press, its representative, can or should be denied the First Amendment right to publish whatever has taken place in such proceedings. The publication of "certain facts that strongly implicate an accused" may have some prejudicial effect on the community. Such "facts," however, frequently are not nearly as destructive of an atmosphere of impartiality as are the rumors and/or misstatement of facts spread through the community whenever a sensational event occurs.

This Court often has recognized the role which the press can serve as the "handmaiden of effective judicial administration," and as a guarantor of the fairness of trials. It was not only in recognition of the freedom of the press, but also in recognition of the valuable service rendered by the press in attempting to accurately convey to the public that which is occurring, that this Court in *Sheppard v. Maxwell*, *supra*, suggested the numerous alternatives open to a court to alleviate the effects of possibly prejudicial activities surrounding the trial of a criminal defendant, and refused to consider the imposition of any prior restraint on publication by the press.

Standards adopted by this Court in the past relating to contempt as a subsequent punishment for asserted improper publications are not and should not be the standards laid down for the publication of matters arising in the open court or any proceedings attached thereto. The only standard that should apply to this type of publication is the standard clearly set forth by the First Amendment itself.

To hold otherwise would be to deny to the people their right to be informed in a timely way as to the



operations of their government and would pose a serious and imminent threat to the First Amendment's guarantee to our people of a free press. As stated by Mr. Justice Douglas in *Craig v. Harney*, 331 U.S. 367, 374 (1947):

"A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."

**No Direct Prior Restraint May Be Imposed, Consistently With the First and Fourteenth Amendments to the Constitution, Upon the Publication By the Press of Information Which Does Not Relate to the National Security and Which Could Not Result In Direct, Immediate and Irreparable Damage to the Nation Or Its People.**

It is the position of ANPA that the judicial restrictive order issued by Respondent in the trial of Erwin Charles Simants in the District Court of Lincoln County, Nebraska and supported in part by the Supreme Court of Nebraska and, upon application to this Court for a stay, by Justice Blackmun, is in direct conflict with the long line of cases in this Court which establish the constitutional prohibition on prior restraints on the freedom of the press. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Craig v. Harney*, 331 U.S. 367 (1947); *Bridges v. California*, 314 U.S. 252 (1941); *Near v. Minnesota*, 283 U.S. 697 (1930). There is no doubt but that "previous restraints on the publication of information come be-

fore the courts with a heavy presumption of invalidity." *New York Times Co. v. United States*, *supra*, at 714. This Court has long affirmed the concept that our constitutional freedom of speech and of the press primarily consists of permitting no prior restraints on the right to speak or publish. This Court has noted: "In the first place, the main purpose of such constitutional provisions is to prevent all such previous restraints upon publications as had been practiced by other governments. . . ." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

With the exception of publications during time of war which threaten national security, *see, Schenck v. United States*, 249 U.S. 47 (1919), this Court has never upheld the imposition of prior restraints upon publications, otherwise constitutionally protected. In the context of *subsequent* punishment of press publication which may impair the orderly administration of justice, it has been held that the "substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges v. California*, 314 U.S. 262, 263 (1941). Nevertheless, even in those cases involving subsequent punishment of the press, this Court has refused to hold that the publications involved posed a "serious and imminent threat to the administration of justice." *Craig v. Harney*, 331 U.S. 367, 372 (1947). Although the above standards may be appropriate in cases which involve subsequent punishment, they cannot be held to authorize the imposition of a prior restraint on publications, the content of which is not yet known, for "the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may



result." *New York Times Co. v. United States*, 403 U.S. 713, at 725-26 (1971) (Brennan J. concurring; footnote omitted).

It is in this regard, fortunately, that the American system of protecting a criminal defendant's right to trial before an impartial jury differs from the English system. Under the English system of contempt, judges summarily punish for contempt of court newsmen responsible for publishing either evidence or comment on any matter inadmissible at trial—that is, material such as prior confessions of the defendant; past criminal records; comment relating to past misbehavior or moral conduct; comment ridiculing the accused's character; and any expression of opinion concerning guilt or innocence in a pending trial. Although this shows a commendable regard for the rights of criminal defendants, it also works to substantially impair the freedom of the English press and the public's right to be informed as to the administration of justice. In a report on the British press, published by a political and economic planning group of civic and government leaders in 1938, the following significant comment was made:

"One of the chief legal hindrances to the liberty of the Press is the uncertain nature of the offense of contempt of court, and the arbitrary judicial procedure in such cases. While it would evidently be undesirable to permit cases to be tried in the newspapers in advance of the trial, or to allow confidence in the quality of justice to be undermined by abuse or ridicule, there is no doubt that a great deal of reasonable criticism of the administration of justice is thereby discouraged." Political and Economic Planning Group, *A Report on The British Press* (1938), p.212.

Moreover, this Court, in commenting on the English common law power of judges to punish by contempt out-of-court publications tending to obstruct the fair administration of justice in a pending trial, noted that "[w]e cannot start with the assumption that . . . to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases." *Bridges v. California*, *supra*, at 271. Therefore, "the First Amendment cannot reasonably be taken as approving prevalent English practices," and press freedom, in this context, must be given "the broadest scope that could be countenanced in an orderly society." *Id.* at 265.

An additional danger to the freedom of the press is posed, we respectfully submit, by the fact that it is extremely difficult, if not impossible, to determine before publication whether, in a given criminal proceeding, publication of confessions, admissions against interest, or other information strongly implicative of the accused, actually will deny a defendant his Sixth Amendment right to trial before an impartial jury. Admittedly, irresponsible publication of the kinds of information covered by Respondent's "gag" order may raise certain preconceived notions on the part of prospective jurors as to the guilt or innocence of the accused. However,

"to hold that the mere existence of any preconceived notion as to the innocence or guilt of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality, would be to establish an impossible standard."

*Irvin v. Dowd*, 366 U.S. 717, 723 (1961)

The issue, therefore, is whether publication of the sort herein proscribed will create prejudicial impressions in the minds of veniremen which "may fairly be presumed to yield to the testimony offered" or whether it will create partiality "which close[s] the mind against the testimony that may be offered in opposition to it." *United States v. Burr*, 25 Fed. Cas. 49, 51 (1807).

The mere fact that a jury may be generally aware of facts strongly implicative of the defendant, or even specifically aware of the fact that the defendant made a self-incriminating statement, does not deny to that defendant his Sixth Amendment rights. The practice of excluding the jury during a preliminary examination as to the admissibility of a confession remains within the discretion of the trial judge in some jurisdictions, and in no cases that your amicus has been able to find has it been elevated to the status of a constitutional right. Moreover, if it were true that mere public knowledge of a confession or of a defendant's past criminal record would prevent a subsequent fair trial, "after a verdict had been reversed on appeal, for the improper admission of a confession, the case could not be retried." *Baltimore Radio Show v. Maryland*, 67 A.2d 497 (1949), *cert. denied*, 388 U.S. 912 (1950).

This Court has held on various occasions that the mere fact that jurors had read news accounts that were prejudicial and implicative of the defendant was not sufficient to warrant reversal on due process grounds. *Murphy v. Florida*, — U.S. —, 44 L.Ed.2 589 (1975); *Beck v. Washington*, 369 U.S. 541 (1962); *Stroble v. California*, 343 U.S. 181 (1952); *U.S. ex rel. Darcy v. Handy*, 351 U.S. 454 (1956); *Buchalter v.*

*New York*, 319 U.S. 427 (1943); *Holt v. United States*, 218 U.S. 245 (1910); *Thiede v. Utah*, 159 U.S. 510 (1895); *Ex Parte Spies*, 123 U.S. 131 (1887); *Hopt v. Utah*, 120 U.S. 430 (1886).

Furthermore there is nothing in the factual record of this case which would indicate that the local press had created, or would create, a climate of public opinion so inflamed as to constitute "inherent prejudice" to the defendant's right to a "fair" trial. *See, Irvin v. Dowd*, 366 U.S. 717 (1961); *Moore v. Dempsey*, 261 U.S. 87 (1923). Nor is the fact situation herein analogous to that in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), where this Court reversed a state court conviction primarily on the grounds that the trial judge allowed a "circus atmosphere" to prevail in the courtroom by not properly governing the use of the courtroom by newsmen, and by not controlling the release of information to the press by officers of the court. *Id.*, at 358, 359, 361. And indeed, the *Sheppard* opinion specifically declined to "place any direct limitations on the freedom traditionally exercised by the news media." *Id.*, at 350.

Finally, we are compelled to draw this Court's attention to the failure of both the Respondent and the Supreme Court of the State of Nebraska to adopt, or to adequately justify their failure to adopt, available alternative procedural safeguards. Inasmuch as change of venue, change of venire, continuance, or voir dire may be employed to overcome whatever prejudicial effects may be engendered by the constitutionally protected right to publish, prior restraint on the freedom of the press is "both unwise as a matter of policy and poses serious constitutional problems." Report of the Committee on the Operation of the Jury System on



the "Free Press-Fair Trial" Issue, (Kaufman Report) 45 F.R.D. 391, at 401-402 (1969). *See also, Sheppard v. Maxwell*, 384 U.S. 333 (1966); *U.S. ex rel Darcy v. Hardy*, 351 U.S. 454, 463 (1956); *Stroble v. California*, 343 U.S. 181, 193 (1952); *Shepherd v. Florida*, 341 U.S. 50, 52 (1951); *Stroud v. United States*, 251 U.S. 15 (1919); A.B.A. *Advisory Committee on Fair Trial and Free Press, Standards Relating to Fair Trial and Free Press*, (Reardon Report), Sec. 4.1 (1968); *Freedom of the Press and Fair Trial: Final Report with Recommendations by the Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York* (Columbia University Press, 1967).

It therefore is respectfully submitted that the order of the District Court of Lincoln County, Nebraska, presents to this Court a serious violation of the constitutional guarantee of a free press. In view of the court's inability, before the fact of publication, to adequately assess the prejudicial effects, in terms of impermissible juror prejudice, that publicity might produce in this case; and in view of the availability of alternative procedural safeguards, "the press cannot be sanctioned for publishing . . . . In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L.Ed.2d 328, 350 (1975).

If the guarantees of the Sixth Amendment to criminal defendants are permitted to prevail over the rights of the people to a free press in such a manner, the delicate balance among the guarantees of the Bill of Rights will be seriously threatened, and the protections of the First Amendment, particularly its role as

the monitoring "handmaiden of effective judicial administration," *Sheppard v. Maxwell supra* at 350, will be left to the whims of potentially censorious judges.

### CONCLUSION

ANPA respectfully suggests and represents to this Court that no discussion here is necessary as to Question Three presented by the Petitioner's brief, simply because it is so clear that this case presents an undeniable application of the First and Fourteenth Amendments to the Constitution to the improper granting of "gag" orders by the District Court of Lincoln County, Nebraska, and the injunction of the Nebraska Supreme Court dated December 1, 1975, applying a prior restraint on the right of the Petitioners to publish.

Accordingly, we respectfully represent to the Court, in light of all the foregoing, that it should reverse and remand with directions to vacate such orders and, in so doing, this Court should establish a rule of law which will for the foreseeable future lay to rest this subject in the minds of the free people of our democratic country.

Respectfully submitted,

ARTHUR B. HANSON  
FRANK M. NORTHAM  
MITCHELL W. DALE  
HANSON, O'BRIEN, BIRNEY, STICKLE  
AND BUTLER  
888 Seventeenth St. N.W.,  
Washington, D.C. 20006  
  
*Attorneys for Amicus Curiae,  
American Newspaper  
Publishers Association*



## **APPENDIX**

## APPENDIX A

ANPA SPECIAL COMMITTEE ON FREE PRESS  
AND FAIR TRIAL*Chairman:*

D. TENNANT BRYAN, *Publisher*, Richmond (Va.) Times-Dispatch and News Leader.

*Members:*

OTIS CHANDLER, *Publisher*, Los Angeles (Calif.) Times;  
JACK R. HOWARD, *President*, Scripps-Howard Newspapers, New York City, N.Y.;

W. D. MAXWELL, *First Vice President and Editor*, Chicago (Ill.) Tribune;

PAUL MILLER, *President*, Gannett Newspapers, Rochester, N.Y.;

BENJAMIN M. MCKELWAY, *Vice President and Editorial Chairman*, Washington (D. C.) Star;

SAM RAGAN, *Executive News Editor*, Raleigh (N. C.) News & Observer and Raleigh Times;

VERMONT C. ROYSTER, *Editor*, Wall Street Journal, New York City, N. Y.;

ARTHUR OCHS SULZBERGER, *President and Publisher*, New York (N. Y.) Times;

ROBERT L. TAYLOR, *President and Publisher*, Philadelphia (Pa.) Bulletin;

LOUIS A. WEIL, JR., *Publisher and Editor*, Lansing (Mich.) State Journal;

ROBERT M. WHITE, II, *President and Editor*, Mexico (Mo.) Ledger.

*Counsel:*

ARTHUR B. HANSON, *General Counsel*, American Newspaper Publishers Association;

WILLIAM J. BUTLER, JR., *Associate Counsel*, Hanson, Cobb, O'Brien, & Tucker, Washington D. C.

## FOREWORD

This report of the American Newspaper Publishers Association was prepared by a Special Committee of distinguished newspaper executives appointed February 3, 1965 to make a thorough study of the relationship between a free press and fair trial. The Committee submits this report as a contribution from daily newspapers to the public discussion of this important subject.

The twelve-man ANPA Committee on Free Press and Fair Trial includes owners of daily newspapers and other senior executives with policy-making authority. This report has been approved by the ANPA Board of Directors which authorized appointment of the Committee. The appointments were made by Gene Robb, publisher of the Albany (N. Y.) Times-Union and Knickerbocker News, who was then President of ANPA. He was succeeded in April 1966 as ANPA President by J. Howard Wood, publisher of the Chicago Tribune.

In announcing formation of the Committee, Mr. Robb said:

"The public interest is paramount in any consideration of these two constitutional guarantees—a free press under the First Amendment and a fair trial under the Sixth Amendment. These few instances where they appear to be in conflict should be resolved without any loss of our liberties. Indeed the studies now embarked upon concerning the relationships of a fair trial and free press in the administration of justice ought to help preserve and strengthen both. That is our purpose."

The Committee has taken that statement as its charge.

The Committee has worked for nearly two years reviewing the continuing dialogue among members of the Bench, Bar, Press and Law Enforcement officials. It has met alone and jointly with the American Bar Association Advisory

Committee on Fair Trial and Free Press. The Committee has reviewed legal documents, speeches and writing from many sources.

It should be noted that this study is offered independent of the report of the American Bar Association's Advisory Committee on Fair Trial-Free Press, issued in late September 1966. At that time the ANPA report was already in final preparation. Like the ABA Committee, the ANPA offers its findings and its views for the continuing public discussion.

Early in its deliberations, the ANPA Committee concluded that it needed a major legal study including the pertinent case law under United States jurisprudence; a historical review of the first ten Amendments to the U.S. Constitution, making up the "Bill of Rights," and comparisons, where applicable, of the systems in the United States and Great Britain. The Committee charged the ANPA General Counsel and his associates with preparation of those studies which appear as appendices to this report.

In reviewing the results of its own studies and those of others, the Committee has adhered to a fundamental position that the rights discussed in its report belong to all the citizens of the United States. The Press shares with the Bench, Bar and Law Enforcement officials the responsibility for the preservation of the rights of all citizens under our form of government.

In the much discussed Sheppard Case, the United States Supreme Court stated on June 6, 1966:

"A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public



scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media, for what transpires in the court room is public property."

The press recognizes its responsibility.

The ANPA offers this document as a contribution to the preservation and strengthening of these two fundamental Constitutional guarantees—a free press under the First Amendment and a speedy and public trial by an impartial jury under the Sixth Amendment.

STANFORD SMITH,  
*General Manager.*

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION  
750 Third Avenue,  
New York, N. Y. 10017

January 5, 1967

#### CONSTITUTIONAL AMENDMENTS INVOLVED

##### Article I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

##### Article VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witness in his favor, and to have the Assistance of Counsel for his defence."

#### Article XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

#### FREE PRESS AND FAIR TRIAL

##### REPORT OF A SPECIAL COMMITTEE OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

The American Newspaper Publishers Association has devoted nearly two years to a study of a Free Press and Fair Trial and from this major research project have come certain conclusions. Among them are:

- There is no real conflict between the First Amendment guaranteeing a free press and the Sixth Amendment which guarantees a speedy and public trial, by an impartial jury.
- The presumption of some members of the Bar that pretrial news is intrinsically prejudicial is based on conjecture and not on fact.
- To fulfill its function, a free press requires not only freedom to print without prior restraint but also free and uninhibited access to information that should be public.
- There are grave inherent dangers to the public in the restriction or censorship at the source of news, among them secret arrest and ultimately secret trial.
- The press is a positive influence in assuring fair trial.

- The press has a responsibility to allay public fears and dispel rumors by the disclosure of fact.
- No rare and isolated case should serve as cause for censorship and violation of constitutional guarantees.
- Rules of court and other orders which restrict the release of information by law enforcement officers are an unwarranted judicial invasion of the executive branch of government.
- There can be no codes or covenants which compromise the principles of the Constitution.
- The people's right to a free press which inherently embodies the right of the people to know is one of our most fundamental rights, and neither the press nor the Bar has the right to sit down and bargain it away.

This last conclusion is central to all the others, pointed and pertinent though they be to the matter involved. The inescapable conclusion is that the press must be ever vigilant in its opposition to anything that threatens Freedom of the Press.

#### INTERRELATION OF FIRST AND SIXTH AMENDMENTS

The extensive studies of the Committee which are documented in the Appendices delve into the American historical experience to show that the First and Sixth Amendments to the Constitution are not incompatible but mutually supportive. Indeed, there can be no fair trial without a free press, and without fair trial no freedoms can exist.

The American press remains as devoted to the principles of fair trial as it is to a free press, and its insistence that justice be neither clouded nor cloaked in secrecy at any stage is to assure that those principles are maintained.

The characteristic that most distinguishes democracy from totalitarianism is that the means are as important as the end. It is not enough for the people merely to know

the end result of a trial, they need to know the means to that end. Justice cannot be served by secrecy nor can a Free Press serve in secrecy.

It is obvious that the First and Sixth Amendments are so interrelated and so dependent, one upon the other, that modification or dilution of either on the fallacious premise that such action would strengthen the other would, itself, represent a betrayal of the intent of the framers of the Constitution.

There is no conflict between a free press and a fair trial, and those who seek to sway the public with such a contention do a disservice to the people and to the cause of American Freedom.

Some segments of the American Bar appear to have begun their discussions of the Free Press-Fair Trial question with the assumption that pre-trial reporting of facts in criminal matters is itself prejudicial to a defendant. This is a presumption for which no concrete proof is advanced. There are cases cited, of course, in which it is *believed* that a defendant's rights are imperiled by "pre-trial publicity." But this is simply a conjecture—and not a fact. Indeed, in bringing such charges of prejudice in pre-trial reporting, the Bar is not only indicting but convicting without clear evidence that such is true.

In fact, cases cited in Appendix "B" tend to show that pre-trial and in-trial reporting in criminal matters have no real bearing on the outcome of such cases. The only thing pre-trial news endangers is ignorance.

During the course of this Committee's study many jurists made comments which are pertinent to this point.

Judge W. Orvyl Schalick of New Jersey said: "The mere fact that people are informed cannot be construed to mean that they cannot make a fair and impartial determination of the guilt or innocence of anyone accused of a crime."



From Federal Judge Frank W. Wilson of Chattanooga, Tennessee, came these words: "History has taught us that if the public is to know, the press must be free to report. If it is to be free, it must be free to fail as well as to succeed, to err as well as to be correct. Even if the press errs with respect to reporting upon criminal proceedings, that its effect is so prejudicial to the right of a fair trial or that it renders so difficult the job of selecting an impartial jury can be doubted."

Judge Harold R. Medina, of the U. S. Court of Appeals for the Second Circuit and Chairman of the Fair Trial Committee of the Association of the Bar of the City of New York, recently stated for his committee that the Constitutional "guarantee of free speech and free press, and the critical importance of the concept of freedom of communication that underlines this guarantee, preclude, on both constitutional and policy grounds, direct controls of the news media by a governmental scheme of legislative or judicial regulation." He said his committee report, expected in January, 1967, will concentrate on "the steps that we think should be taken by the judicial establishment to put its own house in order."

There should be no assumption that an objective juror must be an ignorant juror, and it is not only a faulty but a dangerous assumption that an over-riding prejudice comes from printed truth. To assume such would be to consign a community to a sterility of information. The public must have the right to make informed judgments about crime in a community, about its law enforcement and its courts. This cannot be done if there is a denial of information which the people need to make such judgments.

It is evident that a speedy and public trial, by an impartial jury guaranteed by the Sixth Amendment can be assured only so long as there is a free press. Such a press assures through scrutiny that the defendant is fairly tried.

On numerous occasions the press has ferreted out the necessary evidence to prove a defendant's innocence. Often, too, the right of citizens has been protected by newspaper disclosure of improper methods used by police in arrest and investigation. These safeguards for defendants cannot be assured if the freedom of the press established by the Constitution is replaced by censorship or restrictions upon full reporting.

It is quite clear that freedom of the press means the right to gather, to print, and to circulate information. Any judicial restraint of that right at any point constitutes a prior governmental restraint on publication. It is, in fact, censorship at the source when judges, by court order, prohibit law enforcement officers of the public from providing information to the public. Such an order came in September of 1966 in Wake County, North Carolina, when two judges issued an order without any statutory authorization that restricted police from revealing anything more than the name of an accused, his address, and the charge against him. Such restrictions are unfair to the public, the police, and the accused. For if the police are not required by public record and public warrant to give an accurate accounting of the arrest of a citizen then the country is well on the road to a police state. It must be remembered that technical criminal charges often, absent counsel, apprise neither the accused nor the public of the crime alleged.

Newspapers, of course, should not abuse their right to publish without prior restraint. Nor should they shirk their responsibilities. In the pursuit of truth, it is well to recall the words of English editor C. P. Scott of some years ago. In pointing out that the primary office of a newspaper is the gathering of news, he said: "At the peril of its soul it must see that the supply is not tainted. Neither in what it gives, nor in what it does not give, nor in the mode of presentation, must the unclouded face of truth suffer wrong. Comment is free but facts are sacred."



Secrecy at the source endangers justice and the general welfare of the public. Thus it is evident that there can be no agreement by the American Press that would even indicate acceptance of any imposition of rules or restrictions upon law enforcement officers which would have the effect of curtailing access by newspapers to truthful information in police or public records pertaining to the commission of crime in any community.

#### UNRESTRICTED PRESS

In the reporting of crime news the press cannot submit to any restrictions which would deprive the accused, as well as the public, of the right to full and unfettered dissemination of the truth. As the eyes and ears of the public, the newspaper is, in truth, a watchdog. In the free functioning of its responsibility, it is the duty of the press to see that a defendant is properly treated and fairly tried. To assume that alleged abuses in the treatment of crime news are always to the detriment of the accused is a false assumption and history proves as much, as demonstrated in Appendices "A," "B," "D," and "E."

The benefits to an accused of full news coverage of arrests and trials were well stated by Senator Sam Ervin of North Carolina during joint hearings in August, 1965, of the Senate Subcommittees on Constitutional Rights and Judicial Administration. Such news coverage, Senator Ervin declared, is the best protection against secret arrest and trial. Thus a defendant in a criminal case should not be denied the right to present to the public any statement with respect to a criminal charge against him. Publication of such news serves the accused in that it often brings forth witnesses in his behalf.

It is pertinent at this point to cite the words of the third man in the Free Press-Fair Trial discussion. That man is the defendant himself, and here are the words of a convict, Hugh Dillion, writing in the Southern Michigan prison

publication. "As distasteful as adverse publicity may be," he said, "it is better to be spotlighted momentarily than abused in darkness."

Both public order and protection of the accused are served by the bright light of truth. When the people are denied information about criminal charges, the denial provides a breeding ground for rumor. For while newspapers may be denied access to information of public concern, the word of crime will circulate. If there is no reliable source of information, such as an authentic news story, rumor and exaggeration can unduly excite and arouse the public. Without a calm appraisal of the truth, the public might well react in fear and terror, as it has on occasion in the past, with a breakdown of law and order as the result. Rumor which promotes exaggeration and distortion is unjust to the accused because it could easily encourage a fear-inflamed people to take the law into their own hands.

Newspapers cannot agree to restrictions which would force them to abdicate or even hamper their responsibility to the public to put fact before rumor. The public interest will be best served by fair and accurate crime news coverage which helps protect the public and the accused from the dangers stemming from excesses in the past on the part of some lawyers and some segments of the press.

Moreover, it is imperative that the public be informed of facts about crime if law enforcement agencies and courts are to enjoy the confidence and respect of the public. As in all functions of government, the proper administration of justice is ultimately up to the people, and it is the responsible press which provides the facts on which an informed public can make judgments and act intelligently.

#### CRIME NEWS REPORTING VITAL

In a study covering a ten-year period from 1955 it was shown that American newspapers devoted only three per

cent of their space to crime news. In that same period of time, the crime rate in America increased by 73 per cent. This increase in crime is of real and vital concern to the law-abiding citizens of the country, and this concern cannot be eased by concealment but only by the bright glare of truth in reporting. Indeed, there is ample evidence that publicity is a deterrent to crime while concealment fosters its growth. Thus, rather than the curtailing of crime news reporting, it would indeed seem that more such reporting is needed in a day when crime is increasing by alarming proportions.

Just as only a small minority of criminal cases—less than 10 per cent—ever reach the jury stage, an even smaller minority of crime reports reaches public print. A survey in New York City in January, 1965, showed that of 11,724 felonies committed only 41 of those were even mentioned in the one newspaper that pays more attention than others to crime news. As to the effect of pre-trial reporting of crime news, a study covering the period of January 25, 1963, to February 11, 1965, resulted in an estimate that in the entire country there were slightly more than 40,000 jury trials of felony cases in that period. In only 101 of these 40,000 cases was the question of prejudice raised, and in only 51 cases did attorneys for either side raise the question of prejudice resulting from news reports. Out of these 51 cases, there were only five in which relief was granted. One new trial was ordered, but no writ of relief was granted on the argument that publication of news made a fair trial impossible. In three of the five cases the rulings pertained to such things as the error by a judge who permitted jurors to read newspapers during the trial, the failure of another judge to act on expressions of prior prejudice of jurors, and denial of a motion by a third judge to order a change of venue because of presumed prejudice in the community. Only in two of the cases were the grounds for reversal based on presumed juror prejudice because of news reports.

Even granted that in rare and isolated cases pre-trial reporting may be a factor in creating an over-riding prejudice in potential jurors, there are procedural remedies present to provide effective safeguards. Such procedural safeguards include change of venue, change of venire, continuance, severance, voir dire, blue ribbon juries, isolation of the jury, instructions, retrial, appeal and habeas corpus. Our studies indicate that these remedies are fully adequate to protect the rights of a defendant.

#### THE SHEPPARD CASE

All of these remedies for the extremely rare case of possible prejudice from "publicity" are advanced in the U.S. Supreme Court's decision on June 6, 1966, in the Sheppard case. It should be pointed out, however, that here the court was dealing with the unusual and not typical case, and the majority opinion, eight to one, makes it clear that the court's words are meant to apply to what the trial judge in the Sheppard case should have done, not what every judge should do in every case. It is obvious that there is no mandate in the Sheppard case for judges across the land.

In regard to the Sheppard case the words of Judge George Edwards of the U.S. Court of Appeals for the Sixth Circuit in a recent statement constitute a pertinent warning to those who are reacting with restrictions in the wake of the Supreme Court's decision. Judge Edwards said:

"... no judge who participated in review of that case advocated the strictures which are currently being contemplated. Justice Clark's opinion for the United States Supreme Court did *not* rule that Dr. Sheppard was denied due process because of pretrial publicity. His opinion did *not* call for sanctions against a free press. His opinion did *not* suggest silencing lawyers for months or years prior to a criminal trial."



Judge Edwards continued:

"Our forefathers elected to put freedom of speech and press first among the amendments which constitute the Bill of Rights. From the concept of freedom of speech and press and criticism and debate has come most of the inventiveness, richness and power of our present society. In my judgment, however, we do not have to choose between compulsory limitations on freedom of speech and press and a fair trial. The judiciary of our country can use the well-known tools for protection of fair trials which have been produced by our legal history."

As Mr. Justice Clark stated for the Court in the Shepard case:

"A responsible press has always been regarded as the handmaiden of efficient judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitation on the freedom traditionally exercised by the news media, for what transpires in the court room is public property."

#### JUDICIAL RESTRICTIONS NOT WARRANTED

Yet the point which still must be made is that the American public's right to a free press should not be jeopardized by judges attempting to impose restrictions on all criminal matters because of the rare and isolated case.

To this Committee it is inconceivable that such drastic restrictions as censorship at the source of news should be imposed upon the entire American democratic system because of possible prejudice in a rare case.

The Committee states that it is a matter of public concern when court orders place restrictions on law enforcement officers in the release of information. Such action could easily lead to judicial domination of the executive branch of government, and may well be an invasion which would threaten the historically honored separation of powers and responsibilities.

The public has the right to know the public's business, and there is no area of public action more vital to the people than the action of their police. Any restrictions on public disclosure of police action is inimical to the public interest.

#### The British System

During the course of this study there was a suggestion by some members of the Bar that the British system of contempt be adopted. As we all know, freedom of the press is guaranteed in the United States by virtue of the specific language of the First Amendment. In Great Britain, however, there is no written constitution embodying such a statement. The British system is based on judicial control and political restraint rather than a constitutional provision affirmed by judicial construction. There are no restraints whatsoever in Great Britain preventing the government from making laws, the effect of which might be to interfere with the operations of the press or any part of it.

With this summary in mind, it must be noted that in Great Britain the courts totally control and restrain the press as regards the reporting of crime news whether it be pre-trial, during trial or subsequent to trial, although in the latter event the control has been least used.

The British restrictions on reporting facts and circumstances surrounding criminal trials are not well defined. An editor who breaches these restrictions may be held in contempt of court and given a maximum punishment of life imprisonment or an unlimited fine, or both. One of the



great problems with this system is that in order to report any more than the minimal information such as the fact that a crime has been committed, it is necessary for the editor to guess what a judge would consider acceptable or admissible. The law of contempt has been judicially construed as different in this country. The British system is incompatible with ours .

#### Codes of Conduct Not Applicable

In the early stages of the study the most often recommended course for the press by the Bar was the adoption of codes of conduct. Such a course must be rejected. From a practical standpoint any such codes would be without value because there is no way to enforce them. An individual newspaper may set its own policy or guidelines; any application of specific conduct must remain the sole responsibility of the independent and individual newspaper.

It is well here, however, to quote again from the statement of Judge Wilson. In respect to such proposed codes, he said:

"In the preparation and negotiations for such codes, the participants should always bear in mind that freedom of the press is not their exclusive right to bargain with. Freedom of the press is the right of the public to know, not merely the right of any particular publisher to report as he chooses. No publisher or group of publishers and no members of the bar or bar associations has the prerogative to bargain away the public's right to know."

#### Appropriate Courtroom Restrictions

This Committee recognizes the practicality at times of certain procedural restrictions regarding newsmen's activities within a courtroom. It recognizes that there are such things as limitations of space in the coverage of major news events or criminal trials of unusual public interest,

and that such solutions as pooling of reporters and photographers may be necessary. Such procedural guides have been accepted by major news organizations and are available if necessary.

In respect to suggested restrictions by Bar associations on their own members, this Committee feels that this is a matter of decision for the Bar itself.

#### Background of this Report

The background from which this Committee received its charge was the release of the Warren Commission Report on the assassination of John F. Kennedy. In that report the press of America was charged with "irresponsibility and lack of self-discipline." A review of the press performance in those dark days at Dallas shows that such criticism was unwarranted. In that crisis on November 22, 1963, the American press was called upon to carry out its responsibility to the people—to tell them not only what had happened, but how the country met the crisis. It was those facts provided by the American press that steadied a reeling nation and a shocked and startled world. The American Press should have been commended rather than censured for its performance.

But it was the Warren Commission Report which triggered the guns of attack on the press, and the cry that the free press is the enemy of fair trial was heard again. Our studies, our historical experience, our common sense, prove the opposite of this contention. They are not incompatible, but dependent one upon the other.

#### Conclusion

The American Press has demonstrated its devotion to the cause of fair trial as it has to the cause of a free press.

This Committee, therefore, cannot recommend any covenants of control or restrictions on the accurate reporting of

criminal matters, or anything that would impair such reporting.

The Committee does recommend that the press stand at any time ready to discuss these problems with any appropriate individuals or groups. Indeed, such positive action can be a far greater force for the cause of justice and the general welfare of the people than the negative force of restrictions on basic freedoms. But there can be no agreement on the part of the American Press to dilute its responsibility, or to circumvent the basic rights and provisions of the Constitution. To agree to any of these things would be a mockery of the guarantee made to the people of this Republic by its founding fathers.

The freedom of the press is a fundamental right and it cannot be abridged. The press shares with the Bench, Bar and Law Enforcement officials the responsibility for preservation of the American liberties embodied in the First and Sixth Amendments.

## APPENDIX B

### Madison's Proposals

*"First.* That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from the people.

*"That* Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

*"That* the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.

*"Secondly.* That in Article 1st, section 2, clause 3, these words be struck out, to wit: 'The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative, and until such enumeration shall be made;' and in place thereof be inserted these words, to wit: 'After the first actual enumeration, there shall be one Representative for every thirty thousand, until the number amounts to ———, after which the proportion shall be so regulated by Congress that the number shall never be less than ———, nor more than ———, but each State shall, after the first enumeration, have at least two Representatives; and prior thereto.'

*"Thirdly.* That in Article 1st, section 6, clause 1, there be added to the end of the first sentence, these words, to wit: 'But no law varying the compensation last ascertained shall operate before the next ensuing election of Representatives.'

*"Fourthly.* That in Article 1st, section 9, between clauses 3 and 4, be inserted these clauses to wit: "The civil

rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or in any pretext, infringed.'

"The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

"The people shall not be restrained from peaceable assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.

"The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.

"No soldier shall in time of peace be quartered in any house without consent of the owner; or at any time, but in a manner warranted by law.

"No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

"The rights of people to be secured in their persons; their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported

by oath or affirmation, or not particularly describing places to be searched, or the persons or things to be seized.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusations, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

"The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers or as inserted merely for greater caution.

"*Fifthly.* That in Article 1st, section 10, between clauses 1 and 2, be inserted this clause, to wit:

"No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.

"*Sixthly.* That in Article 3d, section 2, be annexed to the end of clause 2d, these words, to wit:

"But no appeal to such court shall be allowed where the value in controversy shall not amount to . . . . . dollars: nor shall any fact triable by jury, according to the course of common law, be otherwise re-examinable than may consist with the principles of common law.

"*Seventhly.* That in Article 3d, section 2, the third clause be struck out, and in its place be inserted the clauses following, to wit:

"The trial of all crimes (except in cases of impeachment, and cases arising in the land or naval forces, or the



militia when on actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same States, as near as may be to the seat of the offense.

'In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to maintain inviolate.'

"*Eighthly.* That immediately after Article 6th, be inserted as Article 7th, the clauses following, to wit:

'The powers delegated by this constitution are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial nor the executive the powers vested in the legislative or judicial, nor the judicial exercise the powers vested in the legislative or executive departments.

'The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively.'

"*Ninthly.* That Article 7th be numbered as Article 8th."

#### *Proposals Made by House Committee*

*Proposal First.* "In the introductory paragraph of the constitution, before the words 'We the people, add 'Government being intended for the benefit of the people, and

the rightful establishment thereof being derived from their authority alone.' "

*Proposal Second.* "Article 1. Section 2. Paragraph 3. Strike out all between the words 'direct' and 'and until such,' and instead thereof, insert 'after the first enumeration, there shall be one representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that the number of representatives shall never be less than one hundred, nor more than one hundred and seventy-five; but each State shall always have at least one representative.' "

*Proposal Third.* "Article 1. Section 6. Between the words 'United States,' and 'shall in all cases,' strike out 'they,' and insert 'but no law varying the compensation shall take effect, until an election of representatives shall have intervened. The members.' "

*Proposal Fourth.* "Article 1. Section 9. Between paragraphs two and three insert 'no religion shall be established by law, nor shall the equal rights of conscience be infringed.

" 'The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed.

" 'A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.

" 'No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

" 'No person shall be subject, in case of impeachment, to more than one trial or one punishment for the same

offense, nor shall be compelled to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

“ ‘The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.

“ ‘The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people.’ ”

*Proposal Fifth.* “Article 1. Section 10. Between the first and second paragraph, insert, ‘No State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor the right to trial by jury in criminal cases.’ ”

*Proposal Sixth.* “Article 3. Section 2. Add to the second paragraph, ‘But no appeal to such court shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact, triable by a jury according to the course of common law, be otherwise re-examinable than according to the rules of common law.’ ”

*Proposal Seventh.* “Article 3. Section 2. Strike out the whole of the third paragraph, and insert, ‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

“ ‘The trial of all crimes (except in cases of impeachment, and in cases arising in the land and naval forces, or in the militia when in actual service in the time of war, or public danger,) shall be by an impartial jury of free-

holders of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment, or indictment, by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same State; and if committed in a place not within the State, the indictment and trial may be at such place or places as the law may have directed.

“ ‘In suits at common law, the right of trial by jury shall be preserved.’ ”

*Proposal Eighth.* “Immediately after Article 6, the following to be inserted as Article 7: ‘The powers delegated by this constitution to the Government of the United States, shall be exercised as therein appropriated, so that the Legislative shall not exercise the powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.’ ”

*Proposal Ninth.* “The powers not delegated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively.”

*Proposal Tenth.* “Article 7 to be made Article 8.”

#### *Proposals Sent from House to Senate*

“Article I. After the enumeration, required by the first article of the constitution, there shall be one representative for every thirty-thousand, until the number shall amount to one hundred; after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred representatives, nor less than one representative for every forty thousand persons, until the number of representatives shall amount to two hundred; after



which the proportion shall be so regulated by Congress, that there shall not be less than two hundred representatives, nor less than one representative for every fifty thousand persons.

*"Article II.* No law, varying the compensation to the members of Congress, shall take effect, until an election of representatives shall have intervened.

*"Article III.* Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed.

*"Article IV.* The freedom of speech, and of the press, and the right of people to peaceably assemble and consult for their common good and to apply to the government for redress of grievances, shall not be infringed.

*"Article V.* A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms shall be compelled to render military service in person.

*"Article VI.* No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

*"Article VII.* The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*"Article VIII.* No person shall be subject, except in case of impeachment, to more than one trial, or one punishment, for the same offense, nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law;

nor shall private property be taken for public use without just compensation.

*"Article IX.* In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial; to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

*"Article X.* The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger) shall be by an impartial jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment by a grand jury; but, if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may, by law, be authorized in some other place within the same state.

*"Article XI.* No appeal to the Supreme Court of the United States, shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact, triable by a jury according to the course of the common law, be otherwise re-examinable, than according to the rules of common law.

*"Article XII.* In suits at common law, the right of trial by jury shall be preserved.

*"Article XIII.* Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

*"Article XIV.* No state shall infringe the right of trial by jury in criminal cases, nor the right of conscience, nor freedom of speech, or of the press.



*“Article XV.* The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others, retained by the people.

*“Article XVI.* The powers delegated by the constitution to the government of the United States, shall be exercised as therein appropriated, so that the legislature shall never exercise the powers vested in the executive or judicial; nor the executive the powers vested in the legislature or judicial; nor the judicial the powers vested in the legislature or executive.

*“Article XVII.* The powers not delegated by the constitution, nor prohibited by it to the states, are reserved to the states respectively.”

*Proposals Sent from Senate to States*

*Article the First:* After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall not be less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which, the proportion shall be so regulated by Congress that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

*Article the Second:* No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened.

*Article the Third:* Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

*Article the Fourth:* A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

*Article the Fifth:* No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

*Article the Sixth:* The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Article the Seventh:* No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

*Article the Eighth:* In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

*Article the Ninth:* In suits at common law, where the value in controversy shall exceed twenty dollars, the right

of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

*Article the Tenth:* Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

*Article the Eleventh:* The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

*Article the Twelfth:* The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## APPENDIX C

### FREE PRESS — FAIR TRIAL

#### THE GENESIS OF THE FIRST AND SIXTH AMENDMENTS TO OUR FEDERAL CONSTITUTION

“Liberty to know, to utter and to argue freely according to conscience is above all liberties.”<sup>1</sup>

“In democratic countries, it is not only the right but the duty of every citizen to reveal and complain of official misconduct to criticise existing laws, to favor or oppose changes, and petition for the redress of grievances.”<sup>2</sup>

“The framers [of the Bill of Rights] . . . did not invent the conception of freedom of speech as a result of their own experience of the last few years. The idea had been gradually molded in men’s minds by centuries of conflict. . . . It was formed out of past resentment against royal control of the press under the Tudors, against Star Chamber and the pillory, against the Parliamentary censorship which Milton condemned in his *Areopagitica*, by recollections of heavy newspaper taxation, by hatred of the suppression of thought which went on vigorously on the continent during the eighteenth century. . . .”<sup>3</sup>

In order to understand the meaning of “freedom of the press” to the framers of the First Amendment, one must consider the history of restraint upon the written and spoken word.

Control of the written word dates back at least as far as the public burning of undesirable books by the Emperor

<sup>1</sup> Milton, *Areopagitica*.

<sup>2</sup> Patterson, *Free Speech and a Free Press*.

<sup>3</sup> Chafee, *Free Speech in the United States*.

Augustus.<sup>4</sup> Punishment for writing undesirable material is as old as the Edicts of Constantine making the writing of certain materials punishable by death. Control of writing was effected by the Church after the recognition of the Bishop of Rome as its head. In 490 A.D. a catalogue of forbidden books was issued. Governmental and ecclesiastical censorship was also prevalent in the middle ages.

*Pre-Colonial Period Through 1869 in England*

When Henry VIII severed the Church of England from the control of the Pope, he recognized the political importance of controlling the press. Punishment for denying the royal power of control of the press was beheading. Control was enforced by the issuance of letters patent granting a monopoly over the privilege of printing and selling books. The exclusive privilege of keeping presses was granted to the "Stationer's Company" by royal charter in 1557. Regulation of the Company was vested in the infamous Court of Star Chamber, which had been granted the power of general censorship.<sup>5</sup>

In the reign of Elizabeth I, the privilege of printing was extended to a select few to publish such books as "should first be seen and allowed." Printing was forbidden except in Oxford, Cambridge and London.<sup>6</sup> According to one writer, the "illiteracy of the general public and its long submission to authority was such that public opposition to the regulation of printing did not at that time manifest itself."<sup>7</sup>

Nevertheless, freedom of speech and press began to be manifest and as a result the publication of seditious libel

<sup>4</sup> 63 B.C.-14 A.D.

<sup>5</sup> Supra note 2, at 27-8.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Id.* at 31.

against the Queen's government was made a capital offense, to which truth was no defense.<sup>8</sup> Ordinances for the regulation of the press were published by the Star Chamber in 1586 because of "the enormities and abuses of disorderly persons professing the art of printing and selling books."<sup>9</sup> These ordinances authorized the Stationer's Company to search houses and offices in search of unlawful publications and to destroy all such publications and all presses found.

Under the Stuart regime the continuing increase in illegal press activity caused the Star Chamber to issue regulations requiring licensing and registration before publication, under penalty of forfeiture of the presses for failure to comply. The abolition of the Star Chamber by the Long Parliament in 1641 brought the royal prerogative over the press to an end. The passage of the Licensing Acts by the same Parliament in 1643 established parliamentary power, in place of the royal prerogative, forbidding the printing of objectionable books.<sup>10</sup>

Opposition to control of the press became more prevalent with the rise of literacy in England. Notable among the condemnations of the Licensing Acts was Milton's celebrated poem, *Areopagitica*, which was written to inform the people of England of the countervailing arguments to the enactment of those acts. Reacting to this increased opposition, the restored monarchy under Charles II enacted a statute declaring that "the well-government and regulating of printers and printing presses was a matter to public care and concernment, and that by the general licentiousness of the late times many evilly disposed persons had been encouraged to print and sell heretical and seditious books."<sup>11</sup>

<sup>8</sup> Trial of John Udall, 1 *Howell's State Trials*, 1271 (1613).

<sup>9</sup> Supra note 2 at 32.

<sup>10</sup> *Id.* at 34.

<sup>11</sup> 14 Chas. II, c. 33.



The increased opposition could not be stemmed even by Charles' drawing and quartering violators and destroying their works. Prosecution for violation of the printing ordinances and for seditious libel became a means of destroying political opponents and was administered by the King's Justices most prejudicially.<sup>12</sup>

Opponents of the King and wealthy London merchants financed a multitude of secret printing operations. The English Bill of Rights, enacted in 1685, after the Bloodless Revolution brought William and Mary of Hanover to the throne, established certain political rights of Englishmen, but did not mention freedom of the press. Nevertheless, the control of the press was relaxed, and the Licensing Act was permitted to expire. When Parliament attempted to re-enact the Licensing Act in 1695, its failure to do so marked the end of prior censorship of the press in Britain.<sup>13</sup> Freedom of the press then meant the freedom from previous restraint, but "not a freedom from censure for criminal matter when published."<sup>14</sup> This principle was further enunciated by Lord Mansfield in his charge to the jury in *Miller's Case* in 1770:

"As for freedom of the press, I will tell you what it is; the liberty of the press is, that a man may print what he pleases without license; as long as it remains so the liberty of the press is not restrained."<sup>15</sup>

At the turn of the 18th century, the House of Commons, disturbed by an increase in criticism of its activities by certain publishers, decided to take measures to silence its critics. The first step was the aforementioned attempt to re-enact the Licensing Acts. This failing, Parliament de-

<sup>12</sup> *Supra* note 2, at 41.

<sup>13</sup> *Id.* at 50.

<sup>14</sup> 4 *Blackstone's Commentaries*, 151.

<sup>15</sup> 20 *Howell's State Trials*, 869, 895 (1770).

vised a new method of controlling the press—the stamp tax on newspapers and advertising, passed in 1715.<sup>16</sup> This device was described by the American colonists as "taxes on knowledge."<sup>17</sup> In addition, the English law called for bonds from all publishers and newspapers as a "security for good behavior."

These adverse laws affecting the publication and distribution of newspapers were not fully eliminated in England until 1869<sup>18</sup>—a year after the adoption of the Fourteenth Amendment to the United States Constitution.<sup>19</sup>

The bill for the repeal of the tax on advertising passed the House of Lords without debate; but the debates in the House of Commons on the advertisement tax are by no means lacking in sentiments similar to those expressed as to the other "taxes on knowledge." Mr. Cobden, M.P., on July 1, 1853, in the House of Commons, said:

"It is a question of a tax upon knowledge; because if you want to have newspapers at all in this country, they can only be supported by funds furnished by advertisements." <sup>20</sup>

Even in repealing these odious laws, it should be noted that many in England believed as did Mr. Bentinck, M.P., who in closing the debate on the English bill to repeal the stamp tax, said in the House of Commons on May 11, 1855:

"No advocate of the character of the press of this country could support this measure. He had never yet

<sup>16</sup> 10 Anne, c. 19, paras. 101, 118.

<sup>17</sup> *Supra* note 2, at 57.

<sup>18</sup> Repeal of advertisement tax, 1853; repeal of stamp tax, 1855; repeal of paper tax, 1861; repeal of "security for good behavior" act, 1869.

<sup>19</sup> Adopted July 23, 1868.

<sup>20</sup> Hansard, "Parliamentary Debates," 16 Victoria, Vol. 128, p. 1108.

heard it argued that the press, able and enlightened as it was, was not in want of some check and safeguard against the ebullitions of party and personal feeling. Nothing could be more injurious to the character of the press, or of the public whom it served, than to take away the restrictions which had prevented not the liberty, but the license of the press, and the want of which would cause the country to be inundated with publications that would not only lead to the destruction of the character of the press, but would be attended by the most mischievous results in all large and populous communities.' " 21

On the other hand, the most effective argument in the case for the repeal of this tax was that of Sir Edward Bulwer-Lytton on the second reading of the bill in the House of Commons on March 26, 1855:

" 'Sir, the question really is between the tax collector and the public, and it is this—whether it is not time that we should enforce the great principle of the constitution of civil liberty and of common sense which says that opinion shall go free, not stinted nor filched away by fiscal arrangements, but subject always to the laws of the country against treason, blasphemy and slander.' " 22

" 'It is superfluous to argue the principle that opinion should not be indirectly suppressed by a tax, when the boldest man among us dare not invade it by an open law; and, indeed, if we desired to do so, we have no longer the power.' " 23

<sup>21</sup> Hansard, "Parliamentary Debates," 18 Victoria, Vol. 138, p. 450.

<sup>22</sup> Hansard, "Parliamentary Debates," 18 Victoria, Vol. 137, p. 1123.

<sup>23</sup> *Id.* at 1124.

The foregoing excerpts from these arguments illustrate the development of the English Common Law in comparison to the express written provisions of our Constitution. The repeal of the British newspaper stamp tax, on the ground that Parliament "no longer had the power" thus to restrain the press, put into effect in England essentially the same immunity against abridgment of freedom of the press, as was written into the Constitution of the United States by the First Amendment some sixty-six years earlier.

It is clear from our Country's early constitutional history that resentment against these unpopular taxes and against the widespread use by prosecutors of seditious libel as a means of controlling the press played a great role in the rising sentiment for independence in the American colonies. It is also certain that the newspaper taxes in England and the colonies had their effect upon the enactment of the First Amendment to the United States Constitution.

#### *Colonial Period in America*

"Our liberty depends in freedom of the press and that cannot be limited without being lost." JEFFERSON

The seditious libel trial of John Peter Zenger<sup>24</sup> in New York and his subsequent acquittal by the jury after a charge from the bench that the writing in question was seditious and that truth was no defense, points out the unpopularity of the seditious libel law. The jury was apparently persuaded by the argument put forth by Zenger's attorney (Andrew Hamilton) that the question as to whether the writing was seditious was one for the trier of fact, and that truth was a valid defense.<sup>25</sup>

<sup>24</sup> 17 *Howell's State Trials*, 675 (1735).

<sup>25</sup> *Supra* note 3, at 21.



Having decided to pursue the movement toward separation from England, the Continental Congress sought popular support for the cause. In an *Address of the Continental Congress to the Inhabitants of Quebec*, it was declared that the colonists have five inviolable rights: representative government, trial by jury, liberty of person, easy tenure of land, and freedom of press.<sup>26</sup>

The Constitutions of the states of Virginia, Pennsylvania, and Maryland, all enacted in the year of the revolution, included sections granting freedom of the press.<sup>27</sup> The states of Massachusetts and Delaware also enacted similar clauses in their constitutions in 1780 and 1782, respectively.<sup>28</sup> The Virginia Resolution of Independence, written prior to that State's Constitution, contains the following statement:

"The freedom of the press is one of the greatest bulwarks of liberty, and can never be restrained by any despotick government."<sup>29</sup>

The United States Constitution, as originally drafted, contained no section regarding the press.<sup>30</sup> During the debates in the drafting sessions, Delegate Pinckney of South Carolina, suggested a clause that would grant safeguards to the press.<sup>31</sup> His suggested clause read as follows:

<sup>26</sup> 1 *Journal of Continental Congress*, 57 (1800 Edition).

<sup>27</sup> Rutland, *The Birth of The Bill of Rights*, 1776-1794, 78.

<sup>28</sup> *Ibid.*

<sup>29</sup> Virginia Declaration of Rights Adopted June 12, 1776.

<sup>30</sup> U.S. Constitution, Articles I-VII. The Articles of Confederation were also silent on the subject of the press, Rutland. *The Birth of The Bill of Rights*, 1776-1794, 78.

<sup>31</sup> *Supra* note 3, at 14.

"The liberty of the press shall be inviolably preserved."<sup>32</sup> The various members of the Convention made little comment on this proposed language regarding the press. The comments that were recorded at the state conventions on ratification reflect the strong feeling of that time toward this sacred freedom. Mr. Patrick Henry said:

"With respect to the freedom of the press, I need say nothing further, for it is hoped that the gentlemen who shall compose Congress will take care to infringe as little as possible on the rights of human nature."<sup>33</sup>

Hon. James Lincoln said:

"The liberty of the press was the tyrant's scourge—it was the true friend and finest supporter of civil liberty; therefore, why pass it by in silence?"<sup>34</sup>

The suggestion made by Pinckney to include freedom of the press in the Constitution was, however, rejected on the theory that the powers of Congress extended only to matters expressly delegated to it. Therefore, so long as freedom of the press was not mentioned, Congress would have no authority to legislate on the subject.<sup>35</sup> Others took the opposite position, namely, that Congress had implied as well as express powers, and it was, therefore, necessary specifically to preclude Congress from legislating in the field of freedom of the press.<sup>36</sup>

<sup>32</sup> 5 *Elliot's Debates*, 445.

<sup>33</sup> 3 *Elliot's Debates*, 449.

<sup>34</sup> 4 *Elliot's Debates*, 314.

<sup>35</sup> *Supra* note 3, at 143; also see Rogge, *Congress Shall Make No Law . . .*, 56 Mich. L. Rev. 331, 338-340 (1958).

<sup>36</sup> 3 *Elliot's Debates*, 445-9 (2d Ed. 1836); Patterson, *Free Speech and Free Press*, 116-7.



When the Constitution was presented to the states for ratification, there arose many objections to the fact that there were no clauses protecting freedom of press and religion.<sup>37</sup> And in fact the States were persuaded to ratify the Constitution only upon the understanding that a satisfactory Bill of Rights would be added to the existing document.<sup>38</sup>

### *The Bill of Rights*

In the years before the adoption of the Bill of Rights, "freedom of speech was conceived of as giving a wide and genuine protection for all sorts of discussion of public matters."<sup>39</sup> That this was not a universally held view was pointed out by Benjamin Franklin, a noted printer, when he said:

"Few of us, I believe, have distinct Ideas of its [freedom of press] Nature and extent. . . . If it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my *Liberty* of Abusing others for the Privilege of not being abus'd myself."<sup>40</sup>

At this time, the Supreme Court of Pennsylvania ruled that truth was not a valid defense to libel, thereby diminishing the alleged scope of this freedom.<sup>41</sup> It should be noted, however, that the English common law definition of libel or freedom of the press (see definition of Lord Mans-

<sup>37</sup> Supra note 2, ch. 4.

<sup>38</sup> Supra note 27, at 148, 154, 157, 161-2, 171-4, 181.

<sup>39</sup> Supra note 3, at 13.

<sup>40</sup> 10 *Writings of Benjamin Franklin*, 378 (Smyth Ed. 1907) [Emphasis in original].

<sup>41</sup> *Republica v. Oswald*, Penn. Reports, 1 Dallas 31. (1788).

field, *supra*) did not apply in the United States after the revolution.

"One of the objects of the revolution was to get rid of the English common law on liberty of speech and the press."<sup>42</sup>

Furthermore,

"Liberty of the press as declared in the First Amendment, and in the English common law crime of seditious libel cannot co-exist."<sup>43</sup>

These conflicting views left the perimeters on the freedom of the press undefined up to the date of the First Session of Congress in 1789.

Mr. Madison introduced into the First Congress nine proposed amendments to the Constitution.<sup>44</sup> Madison, a shrewd politician, only proposed amendments which had a probability of passage in the states. He explained: "Nothing of a controvertible nature ought to be hazarded by those who are sincere in wishing for the approbation of  $\frac{2}{3}$  of each House, and  $\frac{3}{4}$  of the State Legislatures. . . ."<sup>45</sup> With reference to freedom of the press, Mr. Madison made the following two proposals contained within two separate amendments:

"The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."<sup>46</sup>

• • •

<sup>42</sup> Schofield, *Essays on Constitutional Law and Equity*, 521, 522.

<sup>43</sup> *Id.*, at 535.

<sup>44</sup> 1 *Annals of Congress* 451 (see appendix A).

<sup>45</sup> 5 *Writings of James Madison*, 4067 (Hunt Ed.).

<sup>46</sup> 1 *Annals of Congress*, 451.

"No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."<sup>47</sup>

The first of the above proposals made by Mr. Madison, dealing with the freedom of the press, was considered the second clause of his proposed Fourth Amendment. The second proposal comprised his entire Fifth Amendment. It should be noted that Madison's proposals concerning trial by jury were contained in his proposed Fifth and Seventh Amendments.<sup>48</sup> After much debate on the floor of Congress, it was decided that all of Madison's proposed amendments should be sent to Committee before being dealt with on the floor.<sup>49</sup>

On Tuesday, July 28, 1789, the Committee reported the amendments to the floor labeling them "Propositions."<sup>50</sup> In Committee, Mr. Madison's two proposals regarding freedom of the press were altered in language, but left as two distinct amendments.<sup>51</sup> It is also important to note that of the nine amendments proposed by Madison, he considered the one relating to free speech, and conscience, "the most valuable amendment in the whole list."<sup>52</sup>

The "fundamental" rights provoked little discussion in either the House or the Senate; the other suggested amendments brought about sharp controversy. While some members of Congress were against the amendments, all were in agreement that those singled out by Madison should be included if the amendments were enacted.<sup>53</sup>

<sup>47</sup> *Id.* at 452.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Id.* at 468.

<sup>50</sup> *Id.* at 699.

<sup>51</sup> *Id.* at 783.

<sup>52</sup> *Id.* at 784.

<sup>53</sup> *Supra* note 27, at 208.

The debates leading up to and concerning the First Amendment leave "freedom of the press" undefined. An understanding of what was meant can be gleaned from the controversy that arose out of the Sedition Act (passed in 1798). Madison made it clear that the First Amendment was directed against both prior restraint and subsequent punishment.<sup>54</sup>

Madison also described the First Amendment as being the "essential difference between the British Government and the American Constitution."<sup>55</sup> There has been some argument put forth that Madison's statement is incorrect. Some authors feel the First Amendment is the same as the laws of contempt of the British Government. One theory construes the First Amendment as enacting Blackstone's concept that "The liberty of the press . . . consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published."<sup>56</sup> This Blackstonian theory dies hard. Whether or not he stated that law correctly, an entirely different view of the liberty of the press was soon enacted in Fox's Libel Act, so that Blackstone's view does not even correspond to the English law of the last 150 years. Furthermore, Blackstone is notoriously unfitted to be an authority on the liberty of American colonists, since he upheld the right of Parliament to tax them, and was pronounced by one of his colleagues to have been an anti-republican lawyer.<sup>57</sup> Not only is the Blackstonian interpretation of our free speech clause inconsistent with eighteenth-century history, but it is contrary to modern decisions and wholly out of accord with a common-sense view of the relations of state and citizen. Judge Cooley, the eminent authority

<sup>54</sup> Carroll, *Freedom of Speech and of the Press in the Federalists Period: The Sedition Act*, 18 Mich. L. Rev. 615, 635 (1920).

<sup>55</sup> Chafee, *Free Speech in The United States*, 19.

<sup>56</sup> IV Blackstone, *Commentaries*, 151.

<sup>57</sup> Dean of St. Asaph's Case, 4 Doug. 73, 172 (1784).



on Constitutional law, made the following rebuttal to Blackstone:

"... The mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications, ... Their purpose [of the free-speech clauses] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. ... The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare people for an intelligent exercise of their rights as citizens."<sup>58</sup>

It is clear, therefore, that the authors of the First Amendment intended the constitutional protection to exceed the Blackstonian idea that liberty of the press supports nothing except a freedom from censorship.<sup>59</sup>

In the year 1788, after a long talk with Thomas Jefferson, Thomas Paine wrote:

"After I got home, being alone and wanting amusement I sat down to explain to myself (for there is such

<sup>58</sup> Supra note 55, at 11.

<sup>59</sup> *Id.* at 18.

a thing) ideals of natural and civil rights and the distinction between them—I send them to you to see how nearly we agree.

"Suppose 20 persons, strangers to each other, were to meet in a country not before inhabited. Each would be a sovereign in his own natural right. His will would be his Law,—but his power, in many cases, inadequate to his right, and the consequence would be that each might be exposed, not only to each other but to the other nineteen.

"It would then occur to them that their condition would be much improved, if a way could be devised to exchange that quantity of danger into so much protection, so that each individual should possess the strength of the whole number. As all their rights, in the first case, are natural rights, and the exercise of those rights supported only by their own natural individual power, they would begin by distinguishing between those rights they could exercise fully and perfectly and those they could not.

"Of the first kind are the rights of thinking, speaking, forming and giving opinions, and perhaps all those which can be fully exercised by the individual without the aid of exterior assistance—or in other words, rights of personal competency—Of the second kind are those of personal protection of acquiring and possessing property, in the exercise of which the individual natural power is less than the natural right.

"Having drawn this line they agree to retain individually the first Class of Rights or those of personal Competency; and to detach from their personal possession the second Class, or those of defective power and to accept in lieu thereof a right to the whole power produced by a condensation of all the parts. These I conceive to be civil rights or rights of Compact, and are distinguishable from Natural rights, because in the



one we act wholly in our own person, in the other we agree not to do so, but act under the guarantee of society." <sup>60</sup>

The statement by Paine is not nearly so novel as he might have imagined. According to Locke there are "primary" and "secondary" qualities of freedom. The primary qualities are like solidity, extension, figure and mobility; secondary qualities are like colors, sounds and tastes, which are "powers to produce various sensations in us by their primary qualities." <sup>61</sup> It is a short leap from Locke's grade of "primary" qualities to Paine's corresponding "natural rights of personal competency"; or from Locke's "secondary" qualities to Paine's corresponding "rights of compact," thereby making the freedom of speech and press "natural rights" in contrast to other personal rights in the Amendments. While expounding on the Bill of Rights to the House of Representatives, Mr. Madison analyzes the various rights in terms of their origins:

"In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the Legislature. In other instances, they specify positive rights, which may seem to result from the nature of the compact. Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature." <sup>62</sup>

<sup>60</sup> Cohn, *The Firstness of the First Amendment*, 56 Yale L.J. 472 (1956).

<sup>61</sup> Locke, II *Essays Concerning Human Understanding*, C VIII.

<sup>62</sup> *Supra* note 60, at 473.

A short time later, Madison proposed still another order for grading these rights. Some guarantees of the Bill of Rights, according to Madison, are asserted against the Executive Branch, others against the Legislative Branch, some against the Federal Government, and others against the State governments. Since, however, the greatest danger, as he believed, lay in the democratic community, the "prescriptions in favor of liberty ought to be leveled in that quarter." <sup>63</sup> With this method of classifying, Madison thought the First Amendment must always be paramount. <sup>64</sup>

It seems appropriate at this juncture to explain how Mr. Madison's proposed Amendments concerning free speech and free press became the First Amendment. As was stated previously, the two amendments proposed by Mr. Madison dealing with freedom of speech and press comprised part of his Fourth Proposal and all of his Fifth Proposal. When the amendments were reported out of committee to the floor of the Congress, Mr. Madison's two proposed amendments were altered slightly, but left as two separate amendments. Of the committee's first four Proposals, the First was a new preamble; the Second dealt with apportionment; the Third dealt with pay to members of Congress; and the Fourth dealt with freedom of religion, and freedom of speech and press.

The entire Fifth Proposal still dealt with freedom of speech and press. After much discussion on the floor of the House, the Proposal dealing with the suggested new Preamble was rejected, thereby making the Proposal dealing with free speech and the press part of the Third and the total of the Fourth Proposal of the House. The members of the House then combined the total of the Fourth Proposal and the part of the Third Proposal dealing with freedom of the press into one Proposal, thereby making

<sup>63</sup> *Id.* at 475.

<sup>64</sup> *Supra* note 52.

the Proposal dealing with freedom of speech and press the Fourth Proposal of the House. The House also added a number of new proposals to those of Madison's. Of these, the one numbered "XIV" also dealt with freedom of the press.

In the Senate, there was an attempt to limit the all-encompassing scope of the freedom of speech and press proposal, by adding the words, "in as ample a manner as hath at any time been secured by the common law."<sup>65</sup> The rejection on the Senate floor of this suggested addition to the proposed amendment clearly indicates that the Senators gave consideration to the fact that the freedom set forth in the proposed Fourth Amendment was absolute, and on reflection decided it was their desire to have it absolute. After much debate, the suggested Third and Fourth Amendments and the free press and speech language of the proposed Fourteenth Amendment, as proposed by the House, were combined into one amendment, dealing with freedom of religion, speech and press. This became Proposal Number Three.<sup>66</sup> It was sent to the states for ratification as Amendment Number Three of twelve suggested amendments.<sup>67</sup> The first and second proposed amendments dealing with apportionment and pay to Congressmen did not receive ratification by the requisite three-fourths of the State legislatures. As a result thereof, the Free Speech—Free Press Amendment moved from the Third Proposed Amendment to become the First Amendment to the Constitution.

It is noteworthy that the first two amendments sent to the States, and not ratified, were purely administrative matters and in no way dealt with basic freedoms. The various states obviously felt that these administrative mat-

<sup>65</sup> 1 *Journal of the Senate* 70 (Sept. 3, 1789).

<sup>66</sup> *Id.* at 77 (Sept. 9, 1789).

<sup>67</sup> 2 *Annals of Congress* (Appendix) 1984-1985.

ters should not clutter up the amendments to the Constitution that were to deal only with basic personal freedoms. Therefore, it can be seen that the free press amendment was the first amendment dealing with basic personal freedoms and, as previously stated, Madison, the proposer of the amendments, considered it the most important freedom of all.

Further proof that such was the feeling in the 18th century is shown by a letter of Thomas Paine to Thomas Jefferson in which the famed pamphleteer stated that the rights of free speech, press, and belief are primary natural rights fully exercised by individuals independent of organized society, while other rights involving an individual's protection against his society or government arise from the "social compact." The latter category included the rights pertaining to trial.<sup>68</sup> Paine's concept stirred the imagination of Thomas Jefferson, who, in a letter to Noah Webster, December 4, 1790, stated that there are two classes of rights: those of belief and opinion which are completely foreign to the exercise of government, and those of personal protection (in which he grouped both freedom of press and guarantees of fair trial) which he described as "fences against governmental encroachment."<sup>69</sup> Cohn pointed out that while Jefferson grouped freedom of press and trial together, he considered the rights of free opinion and dissemination thereof to be essential and primary to all others.<sup>70</sup>

In commenting on the Bill of Rights to the First Congress, Madison, influenced by his correspondence with Jefferson, stated that freedom of the press and the right of free conscience are among the "choicest privileges of the

<sup>68</sup> *Supra* note 60, at 467.

<sup>69</sup> *Id.* at 474.

<sup>70</sup> *Ibid.*



people."<sup>71</sup> He grouped other rights such as trial by jury as not being natural rights.<sup>72</sup>

There is ample evidence as to why the First Amendment is first. Inferences can be drawn from the fact that there was little debate over the freedoms included in this amendment, and that many felt that these included rights were so fundamental that all people had access to them, while other rights were granted through the function of society. It is noteworthy that Thomas Jefferson commented in a letter to Edward Carrington that:

"The basis of our Government being the opinion of the people, the very first object would be to keep that right [of free press]; and were it left for me to decide whether we should have a government without newspapers or newspapers without a government I should not hesitate a moment to prefer the latter."<sup>73</sup>

This view of the importance of the liberty of the press was not unique to Jefferson and his Republican friends. Federalist John Marshall responding to Talleyrand's request that the United States Government take measures to curb anti-French publicity in the press, stated that:

"The genius of the Constitution, and the opinions of the people of the United States, cannot be overruled by those who administer the Government. Among those principles deemed sacred in America; among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence, and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this lib-

<sup>71</sup> Supra note 46, at 453.

<sup>72</sup> Supra note 60, at 473.

<sup>73</sup> Recorded in Chenery, W. L., *Freedom of the Press*, 29 (1955).

erty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied: perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America. No regulations exist which enable the Government to suppress whatever calumnies or invectives any individual may choose to offer to the public eye; or to punish such calumnies and invectives, otherwise than by a legal prosecution in courts which are alike open to all who consider themselves as injured."<sup>74</sup>

#### *The Supreme Court on History of the First Amendment*

The above-described history of the First Amendment has been treated at length by the Supreme Court. It is clear from the cases that the Court bases its high regard for the First Amendment on the solid ground of historical development.

The following extracts from some of the more important cases exemplify the Court's attitude on the fundamental freedom of the press.

"\* \* \* The point of criticism has been 'that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions;' and that, 'the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for hamless publications.'"<sup>75</sup>

<sup>74</sup> Recorded in 56 *Michigan L. Rev.* 331, 347 (1958).

<sup>75</sup> *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 715 (1930).



"For more than a century prior to the adoption of the amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however, truly, the agencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was continuous and unceasing."<sup>76</sup>

"\* \* \* liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts. \* \* \*"<sup>77</sup>

"\* \* \* The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. \* \* \*"<sup>78</sup>

"There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and peti-

<sup>76</sup> *Grosjean v. American Press Co.*, 297 U.S. 233, 245 (1935).

<sup>77</sup> *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

<sup>78</sup> *Thornhill v. State of Alabama*, 310 U.S. 88, 97 (1939).

tion than the people of Great Britain had ever enjoyed. \* \* \*"<sup>79</sup>

"Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>80</sup>

### *Freedom of the Press is a Broad Freedom*

Freedom of the press has been logically extended to include not only the right to print but also the right to publish and distribute what has been printed. In *Winters v. New York*<sup>81</sup> the Supreme Court said:

"Although we are dealing with an aspect of a free press in its relation to public morals, the principles of unrestricted distribution of publications admonish us of the particular importance of a maintenance of standards of certainty in the field of criminal prosecution for violation of statutory prohibitions against distribution."<sup>82</sup>

Nor can freedom of the press be limited to matters of social significance. It extends to matters of no significance and matters which are calculated only to entertain.

"We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar

<sup>79</sup> *Bridges v. California*, 314 U.S. 252, 265 (1941).

<sup>80</sup> *New York Times Co. v. Sullivan*, 376 U.S. 251, 269 (1964).

<sup>81</sup> 333 U.S. 507 (1948).

<sup>82</sup> *Id.* at 510.

with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."<sup>83</sup>

The extent of the freedom was stated in *Bridges v. California*:

"\* \* \* The only conclusion supported by history is that unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."<sup>84</sup>

The Supreme Court has left no doubt that freedom of the press occupies a "preferred position"<sup>85</sup> and is an "essential personal liberty."<sup>86</sup>

#### *Clear and Present Danger Test*

In spite of the breadth of the guarantees of the First Amendment, no freedom is ever absolute, and freedom of the press is no exception. Some of the most commonly recognized legal restraints on a free press are found in libel, obscenity, contempt and treason laws.

These restraints must, of course, have their limitation, and it is in attempting to define this limitation that the Supreme Court has had some of its greatest difficulty.

The clear and present danger test was first enunciated by Justice Holmes in 1919 in *Schenck v. United States*.<sup>87</sup>

<sup>83</sup> *Ibid.*

<sup>84</sup> *Supra* note 79.

<sup>85</sup> *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

<sup>86</sup> *Near v. Minnesota*, *supra* note 75.

<sup>87</sup> 249 U.S. 47 (1919).

Schenck had been charged with inciting resistance to the World War I draft by circulating various pamphlets. The Court there said:

"\* \* \* We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin*, 195 U.S. 194, 205, 206, 49 L. ed. 154, 159, 160, 25 Sup. Ct. Rep. 3. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439, 55 L. ed. 797, 805, 34 L.R.A. (N.S.) 874, 31 Sup. Ct. Rep. 492. *The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.* When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court regard them as protected by any constitutional right. \* \* \*"  
[Emphasis added]<sup>88</sup>

The clear and present danger test has been found applicable by the Supreme Court in contempt cases involving alleged interference by individuals, and the press, with a fair trial.

In *Bridges v. California*,<sup>89</sup> convictions resting upon comments pertaining to pending litigation which were pub-

<sup>88</sup> *Id.* at 52.

<sup>89</sup> *Supra* note 79.



lished in newspapers, were reversed by the Supreme Court as an abridgement of freedom of the press guaranteed by the First Amendment. The Court recognized that the clear and present danger test did not automatically solve all problems of restrictions on a free press, but it said it had "afforded practical guidance in a great variety of cases."<sup>90</sup> The Court went on to say:

"Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial.'"

\* \* \*

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."<sup>91</sup>

As will be shown, *infra*, this same rationale was later applied in *Pennekamp v. Florida*<sup>92</sup> and *Craig v. Harney*.<sup>93</sup>

#### *The Sixth Amendment*

The Sixth Amendment calls for a "speedy and public trial." The *public* trial was taken from English common

<sup>90</sup> *Id.* at 262.

<sup>91</sup> *Ibid.*

<sup>92</sup> 328 U.S. 331 (1946).

<sup>93</sup> 331 U.S. 367 (1947).

law and included in the Bill of Rights as protection against such judicial travesties as the Star Chamber tactics, the Spanish Inquisition and the French Monarchy's *lettre de cachet*.

The following thumbnail history of the Sixth Amendment right to a public jury trial is taken from "Public Information, Criminal Trials and the Cause Celebre."<sup>94</sup>

"After the Norman Conquest, there was a gradual decline in the use of primitive criminal processes, such as trial by ordeal, and a growth of the modern notion of trial by jury. The origin of this method of trying cases came not from ancient customs, but from the exercise of royal prerogative by the Frankish Kings. The kings set up inquests to discover the extent of the royal rights in the community, primarily in financial matters. This practice later included inquiries into criminal offenses. William the Conqueror brought this practice to England. Inquests or assizes, forerunners of the grand jury, became the usual procedure in criminal matters by the end of the twelfth century. Indictment by an inquest created a presumption of guilt. By the thirteenth century, to give the accused a chance to rebut the presumption, he was asked to 'put himself upon the country.' This meant that the accused would accept the decision of the community on the question of guilt, as it was given by his neighbors on the jury. The exact time when this second jury developed is not known. By 1302, the defendant was permitted to challenge any juror who sat on the 'petit jury.' Both of the early juries were chosen for their knowledge of the events that caused the accused to be suspect, not for their freedom from bias. This 'witness' type jury gave way by the sixteenth century to a procedure in which the litigants produced the evidence upon which the jury relied. This technique, though originally used

<sup>94</sup> Ronald Goldfarb, 36 N.Y.U.L. Rev. 810 (1961).



only in civil cases, was extended to criminal trials by 1700. But knowledge of the nature of the indictment and the right of the accused to counsel were still controlled by the crown. The petit jury, however, gained much independence from the decision in *Bushell's Case*. In that case a juror who ignored a direction of the crown to bring in a verdict of guilty was jailed after the jury had acquitted the defendant. The juror brought habeas corpus and was freed. Thereafter, the jury was free to decide as conscience and the evidence warranted, not as the government commanded.

"The colonists in America firmly believed in trial by jury. During the Revolution the Continental Congress granted to the inhabitants of each colony the right to have public trials by 'their peers of the vicinage,' the right to counsel and the right to present witnesses. These rights also appeared in the constitutions of the states, and were eventually incorporated into the federal constitution."

While the right to a public trial is firmly entrenched in our common law, it has never been settled to whom this right belongs, the accused or the public. In *United Press Ass'n v. Valente*,<sup>95</sup> the Court felt that the right to an open trial was a personal right belonging only to the defendant. But in *E. W. Scripps Co. v. Fulton*,<sup>96</sup> the Court considered it a right belonging to the public at large.

In *State v. Keeler*,<sup>97</sup> that Court said of this right:

"primarily it is for the benefit of the accused—But it likewise involves questions of public interest and concern. The people are interested in knowing, and have the right to know how their servants—the judges,

<sup>95</sup> 308 N.Y. 71, 123 N.E. 2d 777 (1954).

<sup>96</sup> 100 Ohio, App. 15, 125 N.E. 2d 896 (1955).

<sup>97</sup> 52 Mont. 205, 156 Pac. 1080 (1916).

county attorney, sheriff, and clerk—conduct the public's business—but the public is interested in every criminal trial that court officers and jurors are kept keenly alive to a sense of their responsibility and the importance of their functions, and interested spectators by their presence are the most potent influence to accomplish this desired end."<sup>98</sup>

While the right to a public trial has been held to belong to the public at large, that right is a qualified one. As shown in "Right of Public and Press to be Admitted to a Criminal Trial,"<sup>99</sup> people have been excluded from courtrooms for all of the following reasons:

Overcrowding; *Kugadt v. State*.<sup>100</sup>

Disorder; *Grummett v. State*.<sup>101</sup>

To Protect Public Health; *People v. Miller*.<sup>102</sup>

Exclude Youth to Protect Morals; *United States v. Kobl*.<sup>103</sup>

Exclude All to Protect Public Morals; *Reagan v. United States* <sup>104</sup> and *People v. Jelke*.<sup>105</sup>

To Allow Young Girl to Testify; *Kirstowsky v. Superior Court*.<sup>106</sup>

<sup>98</sup> *Id.* at 1083.

<sup>99</sup> *Right of the Public and Press to be Admitted to a Criminal Trial*, 35 Tex. L. Rev. 429.

<sup>100</sup> 38 Tex. Crim. 681, 44 S.C. 989 (1898).

<sup>101</sup> 22 Tex. Crim. 36, 2 S.W. 631 (1886).

<sup>102</sup> 257 N.Y. 54; 177 N.E. 306 (1931).

<sup>103</sup> 172 F.2d 919 (3rd Cir. 1949).

<sup>104</sup> 202 Fed. 488 (9th Cir. 1913).

<sup>105</sup> 308 N.Y. 56, 123 N.E. 2d 769 (1954).

<sup>106</sup> 300, P. 2d 163 (Cal. Dist. Ct. App. 1956).

In *In re Oliver*,<sup>107</sup> the Supreme Court held that Michigan had denied a grand jury witness due process of law by convicting him of contempt in a trial from which the public was excluded. In its opinion, the Court recognized that an open trial prevented the use of the court as an instrument of persecution; gave the public, through observation, a feeling of confidence in the judicial system; and encouraged witnesses to give pertinent and truthful testimony. In addition, that Court, in *State v. Keeler*,<sup>108</sup> stated that a public trial can be educational to the public and impresses the judge with his responsibility. Further, a public trial allows an observer an opportunity to see that the accused receives neither favor nor abuse; it also offers a witness, who might not otherwise be found, an opportunity to come forward and be heard if he desires to offer or dispute testimony.

While it must be conceded that the newspaper's right to attend a trial is generally no greater than the right of the public at large, it has been suggested in "Right to a Public Trial,"<sup>109</sup> that barring the curiosity seekers but allowing the press admittance would better fulfill the purposes of a public trial and promote justice more effectively.

In summary, it can be said that exclusion of the public (and the press) from a trial is justified only under very few circumstances where the harm caused by its attendance is greater than the good which automatically accompanies an open trial. The rationale behind a public trial is that the people should be present when the people's justice is being distributed, and the newspaper represents and informs all who cannot be personally present.

#### *Contempt by Publication*

As will be shown by the cases set forth in the section on "History of Contempt" immediately following, the

<sup>107</sup> 333 U.S. 257 (1948).

<sup>108</sup> 52 Mont. 205, 156 Pac. 1080 (1916).

<sup>109</sup> Radin, 6 Temp. L.Q. 381 (1932).

matter of primary concern other than the constitutionally guaranteed right to a public trial has been the other requirement of the Sixth Amendment requiring an impartial jury.

It has been asserted that "pre-trial publicity" given a criminal and the crime of which he is accused has influenced jurors and prospective jurors. Such publicity has led to contempt of court charges being placed against publishers and/or editors of the newspapers involved. Criticism of a judge or the alleged attempt to influence him, are the other main sources of contempt charges placed against newspapers.

It should be noted that there are two types of contempts: civil and criminal. The former is disobedience by a party to an order of the court involving only a matter of a private nature. The latter stems from an alleged hindrance to the administration of justice. Criminal contempt is further divided into acts which are committed in the presence of the court, and those committed out of the presence of the court, the latter being known as "constructive" contempt.

#### *History of Contempt*

Sir John Fox in his *The History of Contempt of Court* stated that:<sup>110</sup>

"The rules for preserving discipline essential to the administration of justice, came into existence with the law itself, and contempt of court (*contemptas curiae*) has been a recognized phrase in English law from the twelfth century to the present time."

The present English contempt law, which was also followed until relatively recent times in this country, was first set forth in the 1760's in *King v. Almon*.<sup>111</sup> There, in find-

<sup>110</sup> Published in 1927.

<sup>111</sup> Unreported officially but see Wilmont *Notes of Opinions and Judgments*, 243 (1802).



ing a bookseller guilty of constructive contempt in publishing a libel, the Judge did not cite any authority but claimed such summary procedures were of "immemorial usage."

There were, however, few cases of contempt in England between 1765 and 1888, when the Law of Libel Act of 1888 was enacted.<sup>112</sup> While the Act granted the newspapers permission to publish reports of a proceeding while it was in progress, the restriction on the press was that the reports be "fair and accurate." The Act provides that once a writ is issued, the case is considered pending and the newspapers are restricted in their reporting. If the material published is inadmissible into evidence, the report is not "fair and accurate."

As shown in *Rex v. Davis*,<sup>113</sup> the newspaper may report what has taken place in open court but any publication reasonably calculated to interfere with the administration of justice is unlawful, and no actual interference need be shown. And as shown in *Rex v. Editor of the Daily Mail*,<sup>114</sup> depending on the circumstances of the case, contempt is possible even if there is no intention to interfere, if the publication "might conceivably prejudice a pending trial."

In the United States, the Courts were given almost unlimited contempt power until 1831, when, after a number of flagrant abuses of this power, Congress passed a bill entitled An Act Declaratory of the Law Concerning Contempts of Court.<sup>115</sup> The Act gives the Federal courts power to punish, among other things, misbehavior of any person in the presence of the court or "so near thereto as to obstruct the administration of justice." [Emphasis added]. In 1918 the heart was taken out of the 1831 statute when

<sup>112</sup> 51 and 52 Viet. c. 64 § 3.

<sup>113</sup> (1945) K.B. 485.

<sup>114</sup> 44 T.L.R., 303, 300 K.B. (1928).

<sup>115</sup> 4 Stat. 487 (1831) (substantially embodied in 18 U.S.C. § 401 (1958)).

the Supreme Court in *Toledo Newspaper Co. v. United States*,<sup>116</sup> showed that "so near thereto" was a causal provision by construing it as a "reasonable tendency" test rather than giving it its obvious *geographical* meaning. It was not until 1941 that *Toledo* was overruled by *Nye v. United States*<sup>117</sup> wherein the Court gave the obvious geographical interpretation to "so near thereto" and a judge's power to punish summarily for constructive contempt was again limited, as it was intended.

"The question is whether the words 'so near thereto' have a geographical or a causal connotation. Read in their context and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms."<sup>118</sup>

Also in 1941, the Supreme Court, in companion cases, decided *Bridges v. California* and *Times Mirror Co. v. Superior Court*.<sup>119</sup> In these cases, for the first time, the "clear and present danger" test was applied to contempt by publication cases. Here the newspaper's right to publish was not predicated on the 1831 statute, as in *Nye*, but rather on the First Amendment. In that case, Harry Bridges sent a public telegram to the Secretary of Labor calling a particular judge's decision outrageous, and asserting that his union "did not intend to allow state courts to override the majority vote of members . . . and to override the National Relations Board." The Supreme Court of California held that the publication had a "reasonable tendency" to interfere with the orderly administration of justice, and that freedom of expression was subordinate to judicial decorum.

<sup>116</sup> 247 U.S. 402 (1918).

<sup>117</sup> 313 U.S. 33 (1941).

<sup>118</sup> *Id.* at 48.

<sup>119</sup> *Supra* note 79.



In reversing, the United States Supreme Court stated:

"\* \* \* Here, as in the Nye Case, we need not determine whether the statute was intended to demarcate the full power permissible under the Constitution to punish by contempt proceedings. But we do find in the enactment viewed in its historical context, a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as commands the breach of which cannot be tolerated."<sup>120</sup>

\* \* \*

"History affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case."<sup>121</sup>

\* \* \*

"\* \* \* It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion.

\* \* \*<sup>122</sup>

\* \* \*

"\* \* \* But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for

<sup>120</sup> *Id.* at 267.

<sup>121</sup> *Id.* at 268.

<sup>122</sup> *Ibid.*

judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. \* \* \*"<sup>123</sup>

In 1946 the Supreme Court emphasized its decision in the *Bridges* case by reversing the Supreme Court of Florida in *Pennekamp v. Florida*<sup>124</sup> and holding that the contempt holding of that State court was violative of the petitioners' right of free expression in the press under the First and Fourteenth Amendments. The case involved the publication by the Miami Herald of two editorials which were considered by the lower court to be contemptuous of the Circuit Court and its judge in that they were unlawfully critical of the administration of criminal justice in certain cases then pending before the Court. The Court said:

"\* \* \* We must, therefore, weigh the right of free speech which is claimed by the petitioners against the danger of the coercion and intimidation of courts in the factual situation presented by this record.

"Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct. It does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in the light of the effect on himself and on the public of creating a clear and present danger to fair and orderly judicial administration. Courts must have power to protect the interests

<sup>123</sup> *Id.* at 271.

<sup>124</sup> 328 U.S. 331 (1946).

of prisoners and litigants before them from unseemly efforts to pervert judicial action. *In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases.* Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." [Emphasis supplied].<sup>125</sup>

• • •

"What is meant by clear and present danger to a fair administration of justice? No definition could give an answer. Certainly this criticism of the judges' inclinations or actions in these pending nonjury proceedings could not directly affect such administration. This criticism of their actions could not affect their ability to decide the issues. Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings. For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants."<sup>126</sup>

• • •

"As we have pointed out, we must weigh the impact of the words against the protection given by the principles of the First Amendment, as adopted by the Fourteenth, to public comment on pending court cases. We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it."<sup>127</sup>

<sup>125</sup> *Id.* at 346.

<sup>126</sup> *Id.* at 348.

<sup>127</sup> *Id.* at 349.

And again the next year, the Supreme Court followed the principles set forth in *Bridges*, in *Craig v. Harney*.<sup>128</sup> There the publisher and certain members of the staff of a Corpus Christi, Texas newspaper were found guilty of contempt in publishing an editorial and news stories concerning the judge's supposed improper handling of a particular case. The newspaper called the Judge's action "arbitrary" and a "travesty on justice" and was quite pointed in its criticism. The Supreme Court reviewed the clear and present danger test, quoted from the *Pennekamp* case and then stated:

"• • • The history of the power to punish for contempt (see *Nye v. United States*, 313 US 33, 85 L ed 1172, 61 S Ct 810, and *Bridge v. California*, 314 US 252, 86 L ed 192, 62 S Ct 190, 159 ALR 1346, both *supra*) and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice."<sup>129</sup>

• • •

"• • • In that sense the news articles were by any standard an unfair report of what transpired. But inaccuracies in reporting are commonplace. Certainly a reporter could not be laid by the heels for contempt because he missed the essential point in a trial or failed to summarize the issues to accord with the views of the judge who sat on the case."<sup>130</sup>

• • •

"This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may

<sup>128</sup> 331 U.S. 367 (1947).

<sup>129</sup> *Id.* at 373.

<sup>130</sup> *Id.* at 374.



not hold in contempt one 'who ventures to publish anything that tends to make him unpopular or to belittle him. . . .' See *Craig v. Hecht*, 263 US 255, 281, 68 L Ed 293, 301, 44 S Ct 103, Mr. Justice Holmes dissenting. The vehemence of the language used is not alone the measure of the power to punish for contempt. The fire which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."<sup>131</sup>

As proof of how restrictive the "clear and present danger" test is, in no case subsequent to *Bridges* has the Supreme Court found the danger "clear and present" enough to justify punishment. In his dissenting opinion in *Craig v. Harney*, Justice Frankfurter recognized that:

"Hereafter states cannot deal with direct attempts to influence the disposition of a pending controversy by a summary proceeding, except when the misbehavior physically prevents proceedings from going on in court, or occurs within its immediate proximity."<sup>132</sup>

The idea has been often advanced that while no "clear and present danger" to justice may exist where the individual allegedly 'influenced' by the publication was a judge, whose judicial temperament enables him to disregard intended 'influences,' the situation may be very different where a jury is involved. This situation arose in 1950 in *Baltimore Radio Show v. Maryland*.<sup>133</sup> Three Baltimore radio stations broadcast a murder suspect's previous record and the fact that he had confessed. The accused waived his right to a jury trial on the ground that an impartial jury could not be found. The stations were found in con-

<sup>131</sup> *Id.* at 376.

<sup>132</sup> *Id.* at 391.

<sup>133</sup> 67 A.2d 497 (1949) cert. den. 338 U.S. 912 (1950).

tempt by the lower court because the broadcasts interfered with a fair trial. The Court of Appeals of Maryland reversed, following the Supreme Court rationale that there was no "clear and present danger" to justice. No longer in Maryland could a distinction be made between jury and non-jury cases. The Supreme Court denied certiorari but stated that its denial was not an indication that it approved of Maryland's decision.

A contempt rule which summarily punishes for something less than a clear and present or real and tangible danger to justice would be doubly dangerous. First, it would necessarily be so vague as to place an improper burden on the newspaper to determine in advance what the caprice of the judge might be with regard to any given story concerning a pending criminal case. Any mention other than the name of the accused and the nature of the alleged crime could lead to a contempt citation.

Second, when the court conducts a contempt proceeding, it exercises summary jurisdiction. This means the judge performs the functions of prosecutor, judge and jury. He presents his own case, determines the law and decides the facts. Under these conditions, it would be difficult indeed, for him to remain impartial in a case involving a newspaper which has offended his dignity.

### *Safeguards Against Prejudices*

Having concluded that a contempt proceeding is not the correct way to deal with 'publicity' which might tend to influence jurors, it would seem that those accused of a crime are left entirely at the mercy of the newspapers. Nothing could be further from the truth. The accused's rights are adequately protected by other safeguards which are a proper part of our judicial system.

1. *Change of Venue*. If the judge determines that "pre-trial publicity" has made it difficult or impossible for the accused to obtain a fair trial, and that twelve impartial



jurors cannot be found in the county where the crime occurred, the trial may, at the judge's discretion, be moved to another locality. Generally, only one change of venue is allowed and the new locality is left to the judge's discretion.

2. *Change of Venue.* This is similar to a change of venue except jurors are brought in from another locality so their impartiality may be assured.

3. *Continuance.* Where public sentiment is running high against the accused, the judge may, in his discretion, grant a motion for continuance to allow time for the prejudicial feelings to subside.

4. *Severance.* This applies to cases with multiple defendants. The accused may move to have his case tried separately from the other defendants so as to avoid an adverse reflection on the merits of his own case arising from publicity directed at one or more of the co-defendants.

5. *Voir Dire.* In most jurisdictions the defendant is allowed to examine the jurymen at length, and challenge an unlimited number of them for 'cause.' An additional specified number of 'preemptory challenges are allowed.

6. *Blue Ribon Juries.* Often prejudices in the public at large can be overcome by installing a jury composed of particularly intelligent or 'knowledgeable' people who can more easily resist external influences in their determination of the case, or might not be affected by these influences because of their knowledge of the general subject matter of the case.

7. *Isolation of the Jury.* Isolating or "locking up" the jury is possible in all cases even though it is not always practical. The object, of course, is to isolate the jury from the harmful external influences after having been impaneled.

8. *Instructions.* The judge usually instructs the jury after all of the evidence has been submitted, prior to its retiring to the juryroom. But instructions may be given at any time during the trial. The instructions, for the most part, inform the juror as to the law of the case and as to those elements of evidence he should consider, and those he should not. By delimiting the areas of consideration, external influences are minimized.

9. *Retrial.* If all of the above safeguards fail to give the accused a fair trial, the trial judge may, at any time, declare a mistrial, or upon conclusion of the trial may grant a motion for a new trial.

10. *Appeal.* If a person is convicted of a crime and he believes that he was denied his fundamental right to a fair trial he may always make application to the appellate courts for review of his conviction.

11. *Habeas Corpus.* Whenever any person is convicted of a crime and believes himself to be improperly incarcerated because his rights were denied him at trial, he may seek release by petitioning for a writ of *habeas corpus*. In such circumstances *habeas corpus* would lie even after time for appeal has expired.

As Justice Douglas once stated:<sup>134</sup>

"The point is that our remedy for excessive comment by the press is not the punishment of editors, but the granting of new trials, changes in venue, or continuances to parties who are prejudiced."

#### *Newspaper's Duty to Inform*

Aside from the First Amendment protection afforded newspapers to allow them to publish, there is a strong

<sup>134</sup> Address at the University of Colorado Law School, May 10, 1960 [The Public Trial and the Free Press, 33 Rocky Mt. L. Rev. 1 (1960)].

moral duty on newspapers which *requires* them to print all newsworthy information which comes to their attention and is in good taste. It would, therefore, be difficult for these newspapers to adhere to an externally inflicted code, as suggested by some as the solution to the Free Press-Trial problem.

The duty and right to inform is based on the necessity of an informed public. As Dr. Gainza Paz, editor of the Buenos Aires paper, *La Prensa*, said in speaking before the American Newspaper Publishers Association after having been driven from his country:

"People all over the world want to know what is going on. Their need is legitimate and imperative. It is the duty of newspapermen to satisfy it. If we fail—if we complacently accept limitations imposed on the people's right to know what is going on,—then their other rights are condemned to disappear too."<sup>135</sup>

In March of 1965, President Johnson recognized the need to furnish the public with details of the apprehension of criminals. On March 25, 1965 a Detroit civil rights worker was murdered in Alabama for her participation in the much publicized Selma to Montgomery civil rights march. The President informed the people over nationwide television that four suspects had been arrested and that they were members of the Ku Klux Klan. He went on to accuse that organization of having used "the rope and gun and tar and feathers" to terrorize its neighbors. And he accused its members of loyalty not to the United States "but to a society of hooded bigots."

Clearly, the President did not consider the dissemination of this material incompatible with the ends of justice.

<sup>135</sup> Hanson, Address Before the Lee Memorial Journalism Foundation, Washington & Lee University, 16 Ala. L. Rev. 248 (1955).

An editorial on this subject in the Flint (Michigan) Journal<sup>136</sup> stated:

"Mr. Johnson put the right of the people to know and the protection of law abiding citizens ahead of the contention of some, including the Genesee County prosecutor, that crime publicity is not compatible with justice."

#### *British System Incompatible*

One solution to the "pretrial publicity" problem often advanced but not regarded seriously by those cognizant of the history behind the First Amendment, is that we revert to the British system on contempt. The Supreme Court cited Madison on this point in *New York Times v. Sullivan*:<sup>137</sup>

"\* \* \* His [Madison's] premise was that the Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty.' The structure of the government, dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects. 'Is it not natural and necessary, under such different circumstances,' he asked, 'that a different degree of freedom in the use of the press should be contemplated?' Id., p. 569, 570. Earlier, in a debate in the House of Representatives, Madison had said: 'If we advert to the nature of Republican Government, we shall find that the censorial power in the people over the Government, and not in the Government over the people.' 4 Annals of Congress, p. 934 (1794). \* \* \*"

<sup>136</sup> March 28, 1965.

<sup>137</sup> 376 U.S. 254 (1964).



As the history previously set forth illustrates, the British law of contempt is incompatible with the First Amendment.

It was the English abuse of such personal freedoms, as freedom of the press, which ultimately led this country to seek independence.

#### *Supreme Court's View of the Amendments Involved*

In order to understand the full impact of the Court's "incorporation" of the First Amendment into the Fourteenth, it is necessary to look at the recent decision of *Pointer v. Texas*.<sup>138</sup> In *Pointer*, the Court incorporates a section of the Sixth Amendment into the Fourteenth, and in *dictum* states that the Sixth Amendment is a fundamental right, and that the entire Sixth Amendment should be "incorporated" into the Fourteenth. This *dictum* puts the First Amendment and the Sixth Amendment on the same footing—both are considered fundamental rights by the Supreme Court.

There is a substantial segment of the present and past Supreme Court bench that believes there is a difference in the freedom granted by the different amendments. Justice Frankfurter interprets the various First Amendment cases as follows:

"\* \* \* free speech, press, and assembly are protected by the Fourteenth, despite the lack of specific mention of them, because 'the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions' \* \* \*" <sup>139</sup>

"\* \* \* the cases are reasoning that the Fourteenth prevents state intrusion upon 'fundamental personal

<sup>138</sup> 380 U.S. 400 (1965).

<sup>139</sup> Frankfurter "Incorporation" of Bill of Rights, 78 Harv. L. Rev. 746, 748 (1965).

rights and liberties,' that among those rights and liberties are free speech, press, etc., which the First Amendment explicitly protects against federal encroachment, and that, because they are fundamental (not because they are contained in the First Amendment), they fall within the scope of the prohibitions of the Fourteenth. \* \* \*" <sup>140</sup>

In one of the concurring opinions in the *Pointer* case, Justice Harlan points out that this decision "is another step in the onward march of the long-since discredited 'incorporation' doctrine."<sup>141</sup> Harlan feels the conviction should be reversed because the Sixth Amendment's rights are 'implicit in the concept of ordered liberty.'<sup>142</sup> Harlan states his opinion as follows:

"\* \* \* The concept of Fourteenth Amendment due process embodied in *Palko* and a host of other thoughtful past decisions now rapidly falling into discard, recognizes that our Constitution tolerates, indeed encourages, differences between the methods used to effectuate legitimate federal and state concerns, subject to the requirements of fundamental fairness 'implicit in the concept of ordered liberty.' The philosophy of 'incorporation,' on the other hand, subordinates all such state differences to the particular requirements of the Federal Bill of Rights (but see *Ker v. California*, *supra*, at 34) and increasingly subjects state legal process to enveloping federal judicial authority. 'Selective' incorporation or 'absorption' amounts to little more than a diluted form of the full incorporation theory. Whereas it rejects full incorporation because of recognition that not all of the guarantees of the Bill of Rights should be

<sup>140</sup> *Id.* at 749.

<sup>141</sup> *Supra* note 138 at 409.

<sup>142</sup> *Ibid.*



deemed 'fundamental', it at the same time ignores the possibility that not all phases of any given guaranty described in the Bill of Rights are necessarily fundamental."<sup>143</sup>

This clearly indicates that some members of the Court are still of the opinion, expressed earlier by Jefferson and Madison, that there exist some differences in the Amendments, and that if one were put against another, those that are fundamental would prevail over those that are not.

Justice Frankfurter points out in his recent article<sup>144</sup> that many of the Supreme Court decisions do not use the word "incorporate," and therefore it is incorrect to assume that this is the theory intended to be applied.

" 'The First Amendment, and the Fourteenth through its absorption of the First. . . ' *Minersville School District v. Gobitis*, 310 U.S. 586, 593.

" 'We have repeatedly held that the Fourteenth Amendment has made applicable to the states the guaranties of the First.' *Douglas v. City of Jeannette*, 319 U.S. 157, 162.

" 'It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.' *Board of Education v. Barnette*, 319 U.S. 624, 639.

" 'The First Amendment, which the Fourteenth makes applicable to the states. . . ' *Murdock v. Pennsylvania*, 319 U.S. 105, 108.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Supra* note 139.

" 'The First Amendment, as made applicable to the states by the Fourteenth. . . ' *Everson v. Board of Education*, 330 U.S. 1, 8.

" 'the First Amendment (made applicable to the States by the Fourteenth). . . ' *McCullum v. Board of Education*, 333 U.S. 203, 210."<sup>145</sup>

From this Frankfurter concludes that there still exists the differences in the various Amendments; some are fundamental and some are not.

It must be remembered that the opinions expressed by Harlan and Frankfurter have never been recorded in anything but concurring opinions, and therefore it may be tenuous to assume that their theory is any more valid than that expressed in the doctrine of "incorporation."

It should be noted that there is also the previously quoted language of the *Pennekamp* case which indicates that in the borderline cases where a free press is in conflict with a fair trial, freedom of the press should prevail. Here the Court clearly makes a distinction between these two rights.

### Conclusion

Upon analysis, it becomes obvious that the problem of "pretrial publicity" has been greatly exaggerated. Only on very rare occasions has the press been guilty of improprieties, and only on even rarer occasions have the previously outlined safeguards failed to protect the accused from these improprieties. Travesties on justice may be occasioned by judges' improprieties as well as by those of newspapermen.

<sup>145</sup> *Ibid.*

As stated by the late Elisha Hanson:<sup>146</sup>

"If it be contended that reporters and broadcasters occasionally are guilty of bad taste or bad manners, then it may be retorted that so also are judges and lawyers and litigants. But the question is not one of taste or manners or how to control or correct them. There is no more excuse for an ill-mannered or inaccurate reporter than there is for an ignorant, intemperate, arbitrary or corrupt judge. Unfortunately, we have suffered from all, but because of our suffering we should not lose sight of the more fundamental issue as to the right of the people to receive information on the conduct of judicial proceedings free from censorship or other forms of restraint by those who conduct them. Nor should we lose sight of the fact that the vast majority of our judges are able, fair and possessed of the highest sense of duty; as are also the vast majority of those who report and comment on judicial proceedings."

Jefferson believed that:

"The basis of our government being the opinion of the people—the way to prevent irregular interpositions of the people is to give them *full information of their affairs* through the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people." [Emphasis added].

Only by maintaining its freedom unfettered, can the press fulfill its obligations.

<sup>146</sup> Supra note 135.

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## APPENDIX D

## FREE PRESS — FAIR TRIAL

THE SUPREME COURT AND JUROR  
PREJUDICE CREATED BY THE NEWS MEDIA

Appendix "A" dealt with, among other things, freedom of the press, the law as to the contempt power of the courts and the procedural safeguards afforded an accused to assure him a fair trial by an impartial jury.

This appendix presents only the law, as enunciated by the Supreme Court decisions, as to allegedly prejudicial news coverage of criminal cases before, during and after trial. The purpose of this paper is not to see what sanctions might be applied against newspapers, but rather to determine the factors which have led the Supreme Court to grant or deny a new trial in cases involving publicity by the news media.

Under the Sixth Amendment to the Constitution of the United States, and under every state constitution, the right of a criminal defendant to be tried by an impartial jury is expressly or implicitly guaranteed. The constitutions of thirty-nine states have a guarantee of an impartial jury similar to that of the Federal Constitution, and in the other eleven states, the guarantee is inferable from a right to a trial by jury.<sup>1</sup> Furthermore, a fair trial by an impartial jury is guaranteed in state cases by the due process clause of the Fourteenth Amendment.<sup>2</sup> With regard to the right to "a speedy and public trial by an impartial jury," the Supreme Court stated in 1866:

"\* \* \* If ideas can be expressed in words, and language has any meaning, this right—one of the most

<sup>1</sup> Will, *Free Press v. Fair Trial*, 12 DePaul L. Rev. 197, 199 N. 7.

<sup>2</sup> In re Oliver, 333 U.S. 257 (1948); In re Murchison, 349 U.S. 133 (1955).

valuable in a free country—is preserved to everyone accused of crime who is not attached to the Army or Navy or Militia in actual service.”<sup>3</sup>

The issue, therefore, is the difficult one of determining whether or not a juror is impartial. The difficulty is compounded by the fact that often a juror will unconsciously harbor a bias which, regardless of his earnest intentions, he is unable to overcome. Even if he is able to set it aside, his knowledge of the prejudicial material often causes him unconsciously to place the burden of proof on the defendant rather than forcing the prosecution to prove its case. In addition, a juror may be well aware that he has a particular prejudice, but may conceal the truth because he would like to be thought of as a “prejudice-free” individual. Similarly, to avoid the focus of attention, a juror may deny having read prejudicial material after having been admonished by the Judge not to do so.

It should be recognized that the outcome of each Supreme Court case turns on the particular facts involved and, therefore, the Court has set down only guidelines which necessarily leave the trial judge with great discretion.

It is the allegation of the news media’s ability to create prejudice or bias in the jury with which we are here concerned. Factual reports concerning evidence which has already been admitted at trial usually pose no problem. According to newspaper critics, the problem is usually created by publication of erroneous or slanted materials or by the publication of factual materials which are inadmissible as evidence. The two most often cited examples of this latter problem are the publication of confessions and prior criminal records. What these critics must realize is that a major difficulty for the newspaper editor lies in attempting to foresee what the Judge will consider admis-

<sup>3</sup> Ex parte Milligan, 4 Wall (71 U.S.) 2, 18 L. ed. 281 (1866).

sible. The Supreme Court stated in 1907 in *Patterson v. Colorado*:<sup>4</sup>

“The theory of our system is that conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”

As will be seen from the cases, *infra*, the fact that a juror has been exposed to prejudicial material does not automatically disqualify him. If he indicates to the Judge’s satisfaction that he is able to set aside any opinion he may have developed as to the guilt or innocence of the accused, he may be considered a qualified juror. Some of the later cases further suggest, however, that a factual situation might be such, where the prejudice is extreme and has permeated the entire community, that partiality will be presumed as to the entire jury.

The Courts also consider the part the defendant and his counsel have played in attempting to combat the prejudicial influence. The Courts have considered whether or not the defendant was responsible for any of the prejudicial publicity, whether he took advantage of the *voir dire* to secure an impartial jury, whether he used all of his peremptory challenges, whether he moved for a continuance, whether he requested a change of venue and whether he moved for a mistrial. While these factors may not be determinative of a defendant’s right to a new trial, they have often strongly influenced the Court.

It is important that a defendant conduct an extensive *voir dire* prior to trial so that an appellate court will have a complete record to review. Without such a record the reviewing court must speculate as to whether or not the jurors were prejudiced, a step they are usually unwilling to take.

<sup>4</sup> 205 U.S. 454 at 462 (1907).



Similarly, if the defendant learns in the course of the trial that the jurors may have had access to prejudicial material he should immediately request that the jury be interrogated as to these facts. Otherwise, the appellate court again has no record to review, and it is unlikely it will look favorably upon the appeal. An additional problem for the trial attorney is that if he requests that the jurors be interrogated, he often will point up the prejudicial publicity and work to the defendant's detriment. The attorney finds himself in the dilemma of wanting to protect his point on appeal and yet not prejudice the defendant in his trial.

### THE CASES

Many cases invoking the Fourteenth Amendment have been reversed because of jury bias brought about by a variety of circumstances. But here we are primarily concerned with cases where *newspaper* publicity has been considered as a prejudicial factor. Two recent cases involving television will also be considered.

The first Supreme Court case of any significance on this subject was *United States v. Reid*,<sup>5</sup> an 1851 case involving murder aboard an American ship on the high seas. The defendant moved the lower court for a new trial because of, among other things, the misbehavior of two jurors in reading a newspaper account of the evidence adduced at the trial while the trial was in progress. The defendant submitted affidavits of the two jurors indicating that they had read parts of the report, but it did not influence their judgment in any way. With regard to the propriety of receiving these affidavits and their impact upon the Court if received, the Court stated as follows:

"The first branch of the second point presents the question, whether the affidavits of jurors impeaching their verdict ought to be received.

<sup>5</sup> 12 How (53 U.S.) 361, 13 L. ed. 1023 (1851).

"It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice. It is, however, unnecessary to lay down any rule in this case, or examine the decisions referred to in the argument. Because we are of opinion that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial. There was nothing in the newspapers calculated to influence their decisions, and both of them swear that these papers had not the slightest influence on their verdict."\*

In 1878 the Court decided *Reynolds v. United States*<sup>7</sup> which set forth the first guidelines on this subject and has been quoted in many of the Court's subsequent opinions. This was a bigamy case where the defendant cited, as two of his grounds for appeal, the facts that the challenges of certain jurors by the accused were improperly overruled and that certain other challenges by the government were improperly sustained. In an attempt to analyze what is necessary in order that a juror be considered impartial, the Court first quoted from several old English cases. The Court then said:

"All of the challenges by the accused were for principal cause. It is good ground for such a challenge that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and

\* *Id.* at 366.

<sup>7</sup> 98 U.S. 145, 25 L. ed. 244 (1878).



be more than a mere impression. Some say it must be positive, *Gabbet*, Cr. L., 391; others, that it must be decided and substantial, *Armistead's Case*, 11 Leigh, 659; *Wormeley v. Com.*, 10 Gratt., 658; *Neely v. The People*, 13 Ill., 685; others, fixed, *State v. Benton*, 2 Dev. & B. L., 196; and still others, deliberate and settled, *Staup v. Com.*, 74 Pa. 458; *Curley v. Com.*, 84 Pa., 151. All concede, however, that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside."<sup>8</sup>

The Court then quoted from Chief Justice Marshall's opinion in *Burr's Trial*:<sup>9</sup>

"Light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him."

The Court in *Reynolds* then went on to say:

"The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.

<sup>8</sup> *Id.* at 155.

<sup>9</sup> 1 *Burr's Trial*, 416.

It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause *the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality*. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. *The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest*. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the considerations of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court." [Emphasis added].<sup>10</sup>

After considering the particular facts of this case, the Court stated that there was not here such a manifestation of partiality as to leave nothing to the "conscience or discretion" of the triers. That while the juror had some hypothetical opinion of the case, there was not such as to raise a manifest presumption of partiality. It was recognized that often the manner of the juror while testifying is often more "indicative of the real character of his opinion than his words" and that the trial judge is usually better able to assess the situation; and, therefore, a reviewing court should not reverse rulings below upon questions of fact except in clear cases. The Court then stated:

"The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opin-

<sup>10</sup> *Supra* note 7, at 155.

ion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so."<sup>11</sup>

From the above it can be seen how difficult it is to lay down rules or even guidelines regarding such an ephemeral factor as what has transpired in the mind of a juror.

In 1886 the Supreme Court decided *Hopt v. Utah*.<sup>12</sup> This was a murder case wherein one of the grounds for appeal involved the ruling of the trial court upon several challenges of the jurors. The Territory of Utah had, at the time, several territorial acts regulating proceedings in criminal cases. One such act stated:

"No person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury [juror], founded upon public rumor, statements in public journals, or common notoriety; provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him. The challenge may be oral, but must be entered in the minutes of the court or of the phonographic reporter."<sup>13</sup>

The defendant on appeal complained of the lower court's refusal to allow challenges for cause as to four jurors. Three of the four were preemptorily challenged by either the defendant or the district attorney, and the defendant had several preemptory challenges which he had not used when the jury was completed. Therefore, as to the three,

<sup>11</sup> Supra note 7, at 157.

<sup>12</sup> 120 U.S. 430, 30 L. ed. 708, 7 S. Ct. 614 (1886).

<sup>13</sup> *Act of the Territory of Utah*, Laws 1884, p. 124.

the defendant's cause could not have been prejudiced because the defendant did not exhaust his peremptory challenges. With regard to the fourth juror, he admitted having heard of the case through the newspapers and read what was represented to be the evidence. He further admitted that he had talked about it since that time; that he had formed a qualified opinion, but that he did not think he had ever expressed that opinion. He went on to explain that it would take evidence to remove this opinion, but that he thought he could sit as a juror as if he had never heard of the case and that what he had heard did not make the least difference. On cross examination he stated that he could sit on the jury and determine the case without reference to anything he had heard and that he was not conscious of any bias or prejudice that might prevent him from dealing with the defendant impartially and, further, that he thought he could try the case according to the law and the evidence. On re-examination, he further stated that he would be guided by the evidence all together, without being influenced by any opinion he might then have or may have previously formed.

The Court in upholding the statute and refusing to reverse defendant's conviction stated:

"By the express terms of the Statute of 1884 he could not be disqualified as a juror for an opinion formed or expressed upon statements in public journals, if it appeared to the court, upon his declaration under oath or otherwise, that he could and would, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him. We think that evidence, or what purports to be evidence, printed in a newspaper is a 'statement in a public journal' within the meaning of the statute; and that the judgment of the court upon the competency of the juror in such cases is conclusive."<sup>14</sup>

<sup>14</sup> Supra note 12, at 434.



It should be noted that here the Court felt that the defendant's failure to exercise all of his peremptory challenges was significant as to the first three jurors complained of, but not determinative as to the fourth. Here, also, note the difference between opinion and prejudice. A juror is competent even though he has formed an opinion through reading a newspaper article if he states he is without prejudice and will be impartial and decide the case only on the evidence and the law.

The following year, in 1887, the Court decided *Ex Parte: Spies*.<sup>15</sup> Here the Court dismissed an appeal from a conviction of murder. As one ground for appeal, defendant challenged the validity of an Illinois statute which provided in part:

"... that it shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence: And provided further, that in the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall upon oath state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement."<sup>16</sup>

The Court cited *Hopt v. Utah*<sup>17</sup> to the effect that no injury is done the defendant if his challenge for cause is disal-

<sup>15</sup> 123 U.S. 131, 31 L. ed. 80, 8 S. Ct. 21 (1887).

<sup>16</sup> *Id.* at 167.

<sup>17</sup> *Supra* note 12.

lowed and he thereafter peremptorily challenged the juror if, after the jury is impaneled, he still had other peremptory challenges which he could have used.

The Court then stated that the Illinois statute was not repugnant to the Constitution of that State which has a provision regarding an impartial jury similar to that of the United States Constitution, and that it was not repugnant to the United States Constitution. The Court next addressed itself to those jurors challenged for cause and selected after the defendant had used all of his peremptory challenges. It quoted at length from *Reynolds v. United States*<sup>18</sup> and concluded that:

"If such is the degree of strictness which is required in the ordinary cases of writs of error from one court to another in the same general jurisdiction, it certainly ought not to be relaxed in a case where, as in this, the ground relied on for the reversal by this court of a judgment of the highest court of the State is, that the error complained of is so gross as to amount in law to a denial by the State of a trial by an impartial jury to one who is accused of crime. We are unhesitatingly of opinion that no such case is disclosed by this record."<sup>19</sup>

The Court here again displayed its unwillingness to overrule a lower court judge who had personally witnessed the testimony of the jurors on the *voir dire*. It should be noted that the statute says not only that the prospective juror must state upon oath that he believes he can "fairly and impartially render a verdict," but further that the Court must be "satisfied of the truth of such statement."

The case of *Simmons v. United States*,<sup>20</sup> decided in 1891, was an appeal from a conviction of aiding and abetting an

<sup>18</sup> *Supra* note 7.

<sup>19</sup> *Supra* note 15 at 180.

<sup>20</sup> 142 U.S. 148, 35 L. ed. 968, 12 S. Ct. 171 (1891).



embezzler and misapplying funds. Here the lower court judge discharged the first jury impaneled upon learning that one of the jurors had sworn falsely on his *voir dire* and that that juror and others had read an article caused to be published in the newspapers by the defendant, commenting on the evidence. Upon being convicted by a second jury, the defendant complained of the discharge of the first. To this the Supreme Court stated:

"It needs no argument to prove that the judge, upon receiving such information, was fully justified in concluding that such a publication, under the peculiar circumstances attending it, made it impossible for that jury, in considering the case, to act with the independence and freedom on the part of each juror requisite to a fair trial of the issue between the parties. The judge having come to that conclusion, it was clearly within his authority to order the jury to be discharged, and to put the defendant on trial by another jury  
• • • • •<sup>21</sup>

The Court thus once again upheld a trial judge's discretion in matters such as this.

In 1892, the Supreme Court decided the case of *Mattox v. United States*<sup>22</sup> involving a murder in that part of the Indian Territory which was part of the United States Judicial District of Kansas. The defendant submitted several affidavits of jurors, some of which stated that after the cause had been submitted to the jury and while the jurors were deliberating on their verdict and before they had agreed upon their verdict, a newspaper containing comment upon the case was introduced into the jury room and the comment was read to the jury. The article stated that the defendant would be a lucky man if he was not found guilty because the evidence against him was very

<sup>21</sup> *Id.* at 154.

<sup>22</sup> 146 U.S. 140, 66 L. ed. 917, 13 S. Ct. 50 (1892).

strong; that it was not expected the jury deliberation would last an hour; that the prosecuting attorney's speech was so strong that defendant's friends "gave up all hope of any result but conviction." The affidavits did not indicate what influence, if any, the reading of the newspaper had upon the jurors, but were confined to statements as to what they had read. The Court concluded that, while the evidence of jurors as to the motives and influence which affect their deliberation is inadmissible either to impeach or support the verdict, the Court may consider an affidavit concerning any facts which might have a bearing upon the question of the existence of any extraneous influence. Therefore, the affidavits stating that the newspaper had been read by the jurors was admissible, but any statement as to the effect of the articles on the minds of the jurymen was inadmissible. The Supreme Court considered the exclusion of the affidavits by the District Court as reversible error. Here, then, the reversal was based on exclusion of the affidavits by the District Court, *rather than on the presence of prejudicial publicity.*

*Thiede v. Utah*<sup>23</sup> was another case brought under the statute of the Territory of Utah.<sup>24</sup> One of the assignments of error was the overruling of defendant's challenges for cause directed against four jurors on the ground that on *voir dire* they had shown themselves incompetent to serve. The jurors had testified that they had read accounts in the newspaper concerning the murder involved, that they had formed certain impressions from their reading, *but that they could lay aside these impressions and try the case impartially on the evidence presented.* The Court ruled that the jurors' testimony clearly placed them within the terms of the statute of the Territory of Utah, and there was no error in overruling the challenges.

<sup>23</sup> 159 U.S. 510, 40 L. ed. 237, 16 S. Ct. 62 (1895).

<sup>24</sup> *Supra* note 13.

In *Holt v. United States*,<sup>25</sup> in 1910, the Supreme Court affirmed the Circuit Court of the United States for the Western District of Washington on a conviction for murder allegedly committed on a military reservation. Error was claimed by the defendant in that the lower court did not sustain a challenge for cause to a particular juror. The juror admitted he had taken the newspaper statements regarding the case for facts and that he had no opinion other than that derived from the papers, and that evidence would change it very easily, although "it would take some evidence to remove it." Further, he stated that he would make his decision according to the evidence or lack of evidence at the trial. Mr. Justice Holmes, in delivering the opinion of the Court, stated:

"The finding of the trial court upon the strength of the juror's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which it is far from being in this case. See *Reynolds v. United States*, 98 U.S. 145, 25 L. ed. 244; *Hopt v. Utah*, 120 U.S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; *Spies v. Illinois*, 123 U.S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22."<sup>26</sup>

With regard to defendant's allegation that the jury had been allowed to separate and during the separation some members of the jury had read a newspaper article concerning the case, the Court stated that while it may be assumed that if they separated they did read matter concerning the case, that it is not to be automatically inferred from this that prejudice resulted. Justice Holmes stated:

"If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be

<sup>25</sup> 218 U.S. 245, 54 L. ed. 1021, 31 S. Ct. 2 (1910).

<sup>26</sup> *Id.* at 248.

hard to maintain jury trial under the conditions of the present day."<sup>27</sup>

The Court, therefore, again confirmed its rulings in previous cases to the effect that a juror can be competent even though he has formed an opinion, and further that questions as to a juror's partiality are questions of fact to be reversed except "in very plain circumstances indeed." This case further buttresses the viewpoint that *the newspaper article involved must not only be capable of influence, but must in fact influence.*

One of the more notable cases in this field was the 1919 first degree murder trial of Robert F. Stroud,<sup>28</sup> now better known as the Birdman of Alcatraz. One of the principal grounds upon which reversal was sought was that the lower court erred in not granting a change of venue. This particular trial was for the murder of a guard at Leavenworth prison in Kansas. Prior to the date of trial, the local press had printed some of the testimony for the government as adduced in former trials of this same case. The judge excluded residents of Leavenworth County from the jury, but refused to grant a change of venue. Leavenworth County is one of fifty counties in the judicial division from which the jurors were selected. Certain jurors were challenged for cause on the ground that they favored capital punishment in cases of conviction for murder in the first degree. The Court recognized that as to one of these jurors the challenges should have been sustained. Since, however, he was peremptorily challenged and did not sit on the jury, and since the defendant was accorded two more peremptory challenges than the law required, appellant's cause was not prejudiced by the erroneous ruling below. The Court was unable to find that any of the jurors who heard the case below were objectionable and, therefore, refused

<sup>27</sup> *Id.* at 251.

<sup>28</sup> *Stroud v. U. S.*, 251 U.S. 15, 64 L. ed. 103, 40 S. Ct. 50 (1919).



to reverse the lower court's decision. This case perhaps best serves as an example of the use of safeguards available to insure that the defendant receives a trial by an impartial jury; and that the question of which safeguards should be invoked is best left to the discretion of the trial judge. Here the judge did not feel that the newspaper publicity required a change of venue, but in excluding residents of Leavenworth County from the jury he, in effect, accorded the defendant a change of venire.

Brief mention should be made of the case of *Moore v. Dempsey*.<sup>29</sup> Five Negroes appealed their first degree murder conviction by a trial court of the State of Arkansas. Appellants had been convicted of killing a white man. The case was reversed, *but not because of newspaper publicity*. The case so infected the emotions of the entire community that the Supreme Court concluded a fair trial would have been impossible "• • • no juryman could have voted for an acquittal and continued to live in Phillips County • • •." The case is mentioned here only because the Supreme Court account of the facts indicated that the newspapers had published inflammatory articles. It could not be said, however, that the newspaper accounts were responsible for the atmosphere of prejudice which is said to have permeated the entire community. The Court stated:

"But if the case is that the whole proceeding is a mask,—the counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the state courts failed to correct the wrong,—neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights."<sup>30</sup>

<sup>29</sup> 261 U.S. 87, 67 L. ed. 543, 43 S. Ct. 265 (1923).

<sup>30</sup> *Id.* at 91.

Except for the case of *Moore v. Dempsey*<sup>31</sup> and a relatively insignificant case called *Buchalter v. New York*<sup>32</sup> there were few cases on this subject between 1919 and 1951, the subject seeming to have been laid at rest by the Court's earlier opinions mentioned *supra*. In *Buchalter*, the appellant referred to unfair and lurid newspaper publicity, and claimed that the lower court had erred in its rulings on challenges to prospective jurors and in its refusal to grant a change of venue. Here the Supreme Court stated that it had reviewed the record and was unable to conclude that a "convincing showing of actual bias on the part of the jury which tried the defendant is established." The appellants complained of certain errors of state law and the Supreme Court indicated that the due process clause of the Fourteenth Amendment did not enable the Court to review such errors however material they might be under that law.

Starting in 1951 with *Shepherd v. Florida*<sup>33</sup> and continuing up to the present day, where the Supreme Court has just recently decided in *Sheppard v. Maxwell*,<sup>34</sup> the Court has considered a whole new wave of cases concerning jury prejudice allegedly created by the news media. In *Shepherd v. Florida*,<sup>35</sup> the defendants, four Negroes, were tried in Lake County, Florida and convicted of the rape of a white girl. Again, there was the problem of community prejudice with feelings running so high that the defendants had been threatened with lynching; one defendant's parents' home had been burned as had the homes of two other Negro families; the National Guard had been called to protect other Negroes; and Negroes were forced to flee the com-

<sup>31</sup> *Supra* note 29.

<sup>32</sup> 319 U.S. 427, 87 L. ed. 1492, 63 S. Ct. 1129 (1943).

<sup>33</sup> 341 U.S. 50, 95 L. ed. 740, 71 S. Ct. 549 (1951).

<sup>34</sup> 384 U.S. 333, 16 L. ed. 2d 600, 86 S. Ct. — (1966).

<sup>35</sup> *Supra* note 33.



munity. The newspapers had published as a fact that the defendants had confessed, and attributed this information to the sheriff. No confession of any sort was offered at the trial. Motions for a continuance and a change of venue were denied. The Supreme Court reversed, *but only on the grounds of discrimination in selection of the jury, not because of newspaper publicity*. Justice Jackson, however, was joined by Justice Frankfurter in a concurring opinion which stated that they would have reversed because of the "prejudicial influences outside the courtroom," *particularly the newspaper publicity*. Jackson said,

"But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated."<sup>36</sup>

The concurring opinion cited the three leading contempt cases<sup>37</sup> which the Court had recently decided, and recognized that, in light of these cases, it was difficult for a trial judge to deal with press interference with the trial process. Jackson, said, however:

"But if freedoms of press are so abused as to make fair trial in the locality impossible, the judicial process must be protected by removing the trial to a forum beyond its probable influence. Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to a fair trial. These convictions, accompanied by such events, do not meet

<sup>36</sup> *Id.* at 51.

<sup>37</sup> *Craig v. Harney*, 331 U.S. 367, 91 L. ed. 1546, 67 S. Ct. 1249; *Pennkamp v. Florida*, 328 U.S. 331, 90 L. ed. 1295, 66 S. Ct. 1029; *Bridges v. California*, 314 U.S. 252, 86 L. ed. 192, 62 S. Ct. 190 (See Appendix A to this report).

any civilized conception of due process of law. That alone is sufficient, to my mind, to warrant reversal."<sup>38</sup>

Remember, however, that the Court's reversal was in fact based on discrimination in selecting the jury.

It is interesting to note that mention was made by Justice Jackson not only of the newspaper articles, but also of a cartoon published at the time the grand jury was considering the case. The cartoon showed four electric chairs and was entitled "No compromise—Supreme penalty." Jackson did not indicate, whether, to his mind, such a cartoon would, by itself, constitute sufficient prejudicial publicity to warrant reversal.

The next year, in 1952, the Supreme Court was again confronted with a claim that a trial lacked fundamental fairness because of the circumstances surrounding it. Note that the appellants in these cases have switched their attack from particular jurors to general unfairness. In *Stroble v. California*,<sup>39</sup> the defendant was convicted of the first degree murder of a six year old girl. He had previously been arrested for molesting a small girl. Excerpts of a confession were released to the newspapers by the district attorney, who at the same time offered his opinion that the defendant was both guilty and sane. The defendant was arraigned the following morning. One of the principal allegations supporting the claim of an unfair trial was the publication of inflammatory newspaper reports inspired by the district attorney. The papers had labeled the defendant a "werewolf", "fiend" and "sex mad killer." The Supreme Court affirmed the conviction and rejected the contention that unfairness or prejudice resulted from the publication of the confession in the newspaper. Since the confession was read into the record at the preliminary hearing four days after the newspaper

<sup>38</sup> *Supra* note 35, at 52.

<sup>39</sup> 343 U.S. 181, 96 L. ed. 872, 72 S. Ct. 599 (1952).

account was published, the Court felt the defendant had not been prejudiced:

"Petitioner's trial itself was reported by Los Angeles newspapers, usually on inside pages. Petitioner makes no objection to this phase of the newspaper coverage except for the newspaper's occasional reference to petitioner as a 'werewolf.'

"While we may deprecate the action of the District Attorney in releasing to the press, on the day of petitioner's arrest, certain details of the confession which petitioner made, we find that the transcript of that confession was read into the record at the preliminary hearing in the Municipal Court on November 21, four days later. Thus in any event the confession would have become available to the press at that time, for '[w]hat transpires in the court room is public property.' *Craig v. Harney, supra* (331 US at 374, 91 L ed 1551, 67 S. Ct. 1249). Petitioner has not shown how the publication of a portion of that confession four days earlier prejudiced the jury in arriving at their verdict two months thereafter." <sup>40</sup>

The Court then stated that petitioner had failed to show that the newspaper accounts "aroused against him such prejudice in the community as to 'necessarily prevent a fair trial.'" The Court's remarks with reference to petitioner's failure to move for a change of venue were significant:

"At the outset, it should be noted that at no point did petitioner move for a change of venue, although the California Penal Code explicitly provides that whenever 'a fair and impartial trial cannot be had in the county' in which a criminal action is pending, the action may, upon motion of the defendant, be removed to 'the proper court of some convenient county free

<sup>40</sup> *Id.* at 193.

from a like objection.' Of course petitioner's failure to make such a motion is not dispositive of the issue here, since the state court did not decide against petitioner on this ground but rather rejected on the merits his federal constitutional claim." <sup>41</sup>

The Court further suggested that it was significant that petitioner's counsel saw no need to seek a transfer of the action to another county because of the prejudicial newspaper accounts. The Court noted that the matter of the newspaper accounts was first brought to the trial court's attention after the defendant's conviction, in support of a motion for a new trial. In answer to this contention, the trial court stated that the jurors all had been thoroughly examined and had definitely stated that the defendant would be given the benefit of the presumption of innocence, and that there is nothing to show that the jurors ever saw or read the newspapers. To this finding by the trial court the Supreme Court stated:

"Petitioner does not challenge this statement of the court. Indeed, at no step of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. He asked this Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury. It is also significant that in this case the confession which was one of the most prominent features of the newspaper ac-

<sup>41</sup> *Ibid.*



counts was made voluntarily and was introduced in evidence at the trial itself.”<sup>42</sup>

Justice Frankfurter dissented from the Court’s refusal to reverse petitioner’s conviction. He was concerned over the claim that the trial lacked fundamental fairness, particularly because it was a district attorney who had initiated the stories carried by the news media. Here Frankfurter again brought to the fore the view earlier expressed by Justice Jackson and himself in *Shepherd v. Florida supra* to the effect that there should be restraints placed on the publication of news concerning a defendant before trial. Thus the British concept to which Frankfurter remained wedded for the rest of his life, began to appear in dissenting opinions of the Court:

“Jurors are of course human beings and even with the best of intentions in the world they are, in the well-known phrase of Holmes and Hughes, JJ., ‘extremely likely to be impregnated by the enviroing atmosphere. *Frank v. Mangum*, 237 U.S. 309, 345, 59 L. ed. 969, 987, 35 S.Ct. 582. Precisely because the feeling of the outside world cannot, with the utmost care, be kept wholly outside the courtroom every endeavor must be taken in a civilized trial to keep it outside. To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial, is to make the State itself through the prosecutor who wields its power a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice.”<sup>43</sup>

<sup>42</sup> *Id.* at 195.

<sup>43</sup> *Id.* at 201.

With regard to the prosecutor’s participation in the publicity, Frankfurter stated:

“And so I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as part of ‘the traditional concept of the ‘American way of the conduct of a trial.’ ”<sup>44</sup>

Some of the factors which are interesting to note concerning the *Stroble* case are that the Court, in considering the likelihood of partiality existing in the jury, considers the lapse of time between the damaging publicity and the trial; that if publicity of doubtful admissibility is subsequently admitted as evidence, the defendant cannot complain of being prejudiced; that a defendant must prove actual rather than speculative prejudice; that the Court looks unfavorably upon publicity initiated by the prosecutor or other representative of the state. As in previous cases, the fact that the defendant had not used all possible procedures to remedy the pre-trial publicity was considered significant but not dispositive. Thus, in *Stroble v. California*<sup>45</sup> the Court basically reaffirmed its traditional views. Much comment resulting from this case showed that a segment of jurists and lawyers were interested in adopting the minority views of Jackson and Frankfurter as expressed in *Shepherd*<sup>46</sup> and *Stroble*. It is from these dissenting opinions that one may conclude that the Free Press-Fair Trial dialogue began to become more noticeable.

Again in 1952 the Supreme Court considered a case involving newspaper publicity in *Leviton v. United States*.<sup>47</sup>

<sup>44</sup> *Ibid.*

<sup>45</sup> *Supra* note 39.

<sup>46</sup> *Supra* notes 33 and 39.

<sup>47</sup> 343 U.S. 946, 96 L. ed. 1350, 72 S. Ct. 860 (1952).



The defendant's petition for Writ of Certiorari was denied, but Justice Frankfurter filed a memorandum indicating that he thought it would be helpful in understanding the exercise of the Court's discretionary jurisdiction in granting or denying certiorari. This case involved the finding in the jury room of a copy of a newspaper containing an article which had erroneous information as to the facts of the case. Justice Frankfurter quoted from the Court of Appeals majority and dissenting opinions. The majority opinion stated in part:

"We do not think, however, that such a report, erroneous as it was, made a fair trial impossible. The judge gave very explicit instructions that the contents of the article were to be disregarded and went on to point out how the offenses set forth in the indictment differed from those described in the article. Trial by newspaper may be unfortunate, but is not new and, unless the court accepts the standard judicial hypothesis that cautioning instructions are effective, criminal trials in the large metropolitan centers may well prove impossible."<sup>48</sup>

The Court of Appeals dissent stated in part:

"My colleagues admit that 'trial by newspaper' is unfortunate. But they dismiss it as an unavoidable curse of metropolitan living (like, I suppose, crowded subways). They rely on the old 'ritualistic admonition' to purge the record. The futility of that sort of exorcism is notorious. As I have elsewhere observed, it is like the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant. Justice Jackson, in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S. Ct. 716, 723, 93 L. Ed. 790, said that, 'The naive assumption that prejudicial effects can be over-

<sup>48</sup> *Id.* at 947.

come by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.'"<sup>49</sup>

In 1956 in *U.S. ex rel Darcy v. Handy*,<sup>50</sup> the Court again refused to reverse a conviction wherein it was alleged that publicity had surrounded the trial. The petitioner had been convicted of murder in the first degree and sentenced to death. The case reached the Supreme Court through habeas corpus proceedings in the Federal District Court, wherein petitioner alleged he had been denied a fair trial. There were four defendants involved in a robbery-murder, but on motion by counsel, the cases were severed so that petitioner's case was heard separately from the others. One of petitioner's objections was the fact that two of the four defendants involved were tried just a week prior to his trial and that he suffered from the attendant adverse publicity. The Court stated that there was no indication of an atmosphere of hysteria and prejudice and that the proceedings were factually reported in the press. The Court reiterated the fact that it was incumbent upon the petitioner to show the unfairness of his trial:

"While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' *Adams v. United States*, 317 US 269, 281, 87 L ed 268, 276, 63 S Ct 236, 143 ALR 435."<sup>51</sup>

<sup>49</sup> *Id.* at 948.

<sup>50</sup> 351 U.S. 454, 100 L. ed. 1331, 76 S. Ct. 965 (1956).

<sup>51</sup> *Id.* at 42.

The Court then went on to state:

"We have examined petitioner's allegations, the testimony and documentary evidence in support thereof, and his arguments. We conclude that the most that has been shown is that, in certain respects, opportunity for prejudice existed. From this we are asked to infer that petitioner was prejudiced."<sup>52</sup>

The Court next discussed the safeguards afforded any defendant including the *voir dire* examination and the right of peremptory challenge. Also mentioned was the protection available through severance of the trials of the defendants and, further, the protections afforded by continuances and changes of venue:

"In the instant case, notwithstanding the fact that counsel for petitioner did not use all of his peremptory challenges after a searching examination of prospective jurors on *voir dire*, and did not seek a continuance of the trial or a change of venue, petitioner asks this Court, in effect, to infer that the news coverage of the robbery and proceedings prior to petitioner's trial, including the Foster-Zeitz trial, created such an atmosphere of prejudice and hysteria that it was impossible to draw a fair and impartial jury from the community or to hold a fair trial. The failure of petitioner's counsel to exhaust the means provided to prevent the drawing of an unfair trial jury from a community allegedly infected with hysteria and prejudice against petitioner while not dispositive, is significant."<sup>53</sup>

Justices Harlan, Frankfurter and Douglas dissented on other grounds.

<sup>52</sup> *Id.* at 462.

<sup>53</sup> *Id.* at 463.

All of the cases considered thus far have been state cases presented to the Supreme Court on the basis of the denial of due process under the Fourteenth Amendment. In 1959, however, in the case of *Marshall v. United States*,<sup>54</sup> the petitioner was convicted in the United States District Court for the District of Colorado on a charge of unlawfully dispensing certain drugs in violation of a federal statute. The Court granted certiorari because of doubts whether exposure of some of the jurors to newspaper articles was "so prejudicial in the setting of the case as to warrant the exercise of our supervisory power to order a new trial." Here the Supreme Court clearly indicated that it was exercising its general supervisory power over the lower federal courts and was not limited, as in state cases, to determining whether or not "due process" had been afforded the defendant. The newspaper accounts involved told of petitioner's previous record of convictions and contained other prejudicial information involving evidence found at the time of arrest. The trial judge, on learning that the jury had read these news accounts, interrogated the jurors and was told that they would not be influenced by the news articles and that they could decide the case only on the evidence and that no prejudice had resulted from the reading of the articles. The Court recognized that the trial judge has great discretion on ruling on matters such as this but stated:

"We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence."<sup>55</sup>

The Court then again made it clear that it was acting in its supervisory capacity:

"In the exercise of our supervisory power to formulate and apply proper standards for enforcement of

<sup>54</sup> 360 U.S. 310, 3 L. ed. 2d 1250, 79 S. Ct. 1171 (1959).

<sup>55</sup> *Id.* at 312.



the criminal law in the federal courts (*Bruno v. United States*, 308 US 287, 84 L ed 257, 60 S Ct 198; *McNabb v. United States*, 318 US 332, 87 L ed 819, 63 S Ct 608), we think a new trial should be granted.”<sup>56</sup>

In 1961, the Court granted certiorari in *Janko v. United States*,<sup>57</sup> another case emanating from a Federal court. Defendant had been convicted of income tax evasion under the Federal Code. There had been newspaper and radio accounts of the defendant's former convictions, including a prior conviction in the present case which had been set aside. The jurors had, however, been warned on several occasions not to read these accounts and when asked generally by the judge whether they had been influenced by any outside sources, they replied they had not. The issue of publicity prejudice was raised in the Court of Appeals and in an unusual move the Supreme Court granted the petition for certiorari and reversed and remanded the case all in the same memorandum. No opinion was given by the Supreme Court. Here, the Court was again exercising its supervisory power over the lower federal courts, and this case added nothing to the law already established in the *Marshall* case. Neither *Marshall* nor *Janko* are relevant to the due process issue presented by those cases emanating from state courts.

Also in 1961, and in fact slightly prior to the *Janko* decision, the Court decided what is considered by many to be the most important case on this subject, *Irvin v. Dowd*.<sup>58</sup> Prior to this time the Supreme Court had never reversed a state court conviction on the sole ground of prejudice of the jury resulting from comments by the news media. For a complete understanding of this case, a review of the overwhelming facts indicating prejudice is necessary.

<sup>56</sup> *Id.* at 313.

<sup>57</sup> 366 U.S. 716, 6 L. ed. 2d 846, 81 S. Ct. 1662 (1961).

<sup>58</sup> 366 U.S. 717, 6 L. ed. 2d 751, 81 S. Ct. 1639 (1961).

Irvin, the petitioner, had been indicted for murder in Indiana and because of the publicity surrounding the crime of which he was accused, he was granted a change of venue to an adjoining county, but was denied under state law a second change of venue and also was denied a continuance. He was convicted in the second county and sentenced to death. His appeal to the Supreme Court was based on an alleged violation of due process in that he did not receive a fair trial. Six murders had been committed in December of 1954, and four in March of 1955 in the county in which he was indicted. Petitioner was arrested in April of 1955 and shortly thereafter police officials issued press releases to the effect that the petitioner had confessed to the six murders. Opinions as to petitioner's guilt and the punishment which he should receive were solicited on the streets and broadcast over the local radio stations. Scores of newspaper headlines, pictures, cartoons and articles were printed in the local press which was delivered regularly to approximately ninety-five percent of the homes in the second county in which he was tried. The newspaper and radio stories included references to his juvenile record, his convictions for arson and burglary and his military courtmartial. In addition, these stories accused him of being a parole violator and stated that he had confessed to the six murders and had been indicted for four of them. Additionally, the press reported that petitioner had offered to plead guilty if spared the death sentence and that the prosecutor was determined to secure the death penalty. He was described as the “confessed slayer of six” and the stories stated that he had additionally confessed to twenty-four burglaries.

In looking at the jury itself, the Court found that the panel consisted originally of 430 persons. The trial court itself excused 268 on challenges for cause; 103 were excused because of conscientious objection to the death penalty, and the maximum of twenty peremptory challenges were used by the petitioner. The state used only ten per-



emptory challenges. The *voir dire* record covered 2,783 pages and indicated that ninety percent of those examined on the point entertained some opinion as to guilt "ranging in intensity from mere suspicion to absolute certainty." Additionally, out of the twelve jurors finally selected, eight thought petitioner guilty.

The Court upheld its prior decisions and cited many of them as precedent. It stated that under our theory of the law, a juror who has formed an opinion cannot be impartial, but it went on to state:

"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies v. Illinois*, 123 US 131, 31 L ed 80, 8 S Ct 21, 22; *Holt v. United States*, 218 US 245, 54 L ed 1021, 31 S Ct 2, 20 Ann Cas 1138; *Reynolds v. United States* (US) supra." <sup>59</sup>

The Court then stated the tests set forth in *Reynolds* <sup>60</sup> including the fact that the affirmative of the issue is upon the challenger and he must show the actual existence of prejudice, and further that the finding of the trial court

<sup>59</sup> *Id.* at 722.

<sup>60</sup> *Supra* notes 7, 8, 9, 10.

"ought not to be set aside by a reviewing court unless the error is manifest." But the Court felt here that the buildup of prejudice was clear and convincing and that the bias was manifest. It stated that two-thirds of the jurors believed the petitioner guilty and had heard or read information which was inadmissible at trial, and these jurors openly admitted their prejudices. But each said he could be fair and impartial. To this the Court replied:

"Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." <sup>61</sup>

And the Court concluded that the circumstances were such that a reversal was mandatory:

"With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt." <sup>62</sup>

Justice Frankfurter wrote a concurring opinion in which he stated:

"How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception." <sup>63</sup>

<sup>61</sup> *Supra* note 58, at 728.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Id.* at 729.

In analyzing this case, it must first be noted that the facts as to pre-trial publicity were the most extreme seen by the Court to that date. Aside from the general circumstances of deep and bitter prejudice, and aside from the revealing *voir dire* record of 2,783 pages which showed that eight out of the twelve jurors finally selected thought petitioner guilty, it should be noted that the newspaper articles contained the two items considered by a majority of the courts as the most harmful to the defendant; namely, the petitioner's prior criminal record and the fact of a confession. The case was reversed despite the fact that each juror claimed his ability to fairly try the facts. The Court felt that in view of the prevailing atmosphere and extreme circumstances, and notwithstanding the jurors' statements of their ability to render an impartial verdict, the jury could not possibly render a fair verdict.

The full significance of this case cannot, as yet, be ascertained. Certainly, it is significant in that, as previously mentioned, it was the first time the Supreme Court had reversed a state court conviction on the grounds that due process had not been accorded the petitioner, and that the trial was therefore fundamentally unfair, due primarily to the activities of the news media.

That it was the extreme nature of the factual situation that caused reversal by the Supreme Court rather than any revolutionary trend was borne out the following year, in 1962, when the Court declined to reverse a Washington state court in the case of *Beck v. Washington*.<sup>64</sup> Dave Beck, a labor union officer, had been convicted of embezzling union funds. His appeal to the Supreme Court was based primarily on the due process and equal protection clauses of the Fourteenth Amendment, in that adverse publicity had prevented the selection of a fair jury. Petitioner had moved to have the indictment quashed, moved three times for continuances and moved for a change of venue, which

<sup>64</sup> 39 U.S. 541, 8 L. ed. 2d 98, 82 S. Ct. 955 (1962).

motions were all denied. The newspaper stories centered around the fact that large amounts of money had been taken from the teamster labor union treasury and used for Beck's personal benefit. Much was also made of the fact that Beck had taken the Fifth Amendment a number of times during the hearing before the Select Committee on Improper Activities in the Labor or Management Field of the United States Senate. In his objection to the Grand Jury impaneled, petitioner did not contend that any particular juror was prejudiced or biased, but rather that the judge had failed to ascertain on *voir dire* whether the adverse publicity had influenced any of the jurors, and further that the judge had failed to adequately instruct the Grand Jury as to prejudice. The Court rejected these arguments stating that petitioner was furnished an unbiased grand jury and that the judge's instructions were adequate. The Court noted as to the instructions that for the trial judge to have dealt on the matter of the adverse publicity and explained petitioner's taking of the Fifth Amendment before the Senate Committee would have only added fuel to the fire, and been more harmful to petitioner in the long run.

Petitioner's objections to the petit jury again do not single out any particular jurors as being prejudiced, but rather state that the publicity surrounding the trial automatically prevented the selection of a fair jury and that any jury selected from the area in which he was tried must be considered presumptively biased. The Court pointed out that his trial came some nine months after he first appeared before the Senate Committee and five months after his indictment, and that the intensity of the adverse publicity had greatly diminished by the trial date. Additionally, the Court characterized the news accounts at the time of the trial as being "straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness." As to the jury itself, all persons summoned as prospective jurors in the trial of petitioner's father a month



prior were excused, as were all persons who had been in the courtroom at any time during petitioner's father's trial. Of fifty-two persons examined, only eight admitted any bias or even opinion as to petitioner's guilt. Six others suggested they might be biased or might have formed an opinion. All fourteen of these were excused, as were all jurors challenged for cause by petitioner's counsel. Petitioner also exercised all six peremptory challenges allowed him. On *voir dire* each juror selected indicated that he was not biased and that he had formed no opinion as to petitioner's guilt which would require any evidence to remove. After studying the *voir dire*, the Court stated that each juror's qualifications as to impartiality were far greater than that required by the Court in prior cases. Reference was then made to that portion of the *Irvin v. Dowd*<sup>65</sup> decision which held that the existence of a preconceived notion was not enough by itself where the juror can lay aside any opinion he might have and base his verdict on the evidence.

The Court stated:

"We cannot say the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors and would be compelled to find bias or performed opinion as a matter of law. Compare *Irvin v. Dowd*, supra (366 US at 723-728), where sensational publicity adverse to the accused permeated the small town in which he was tried, the *voir dire* examination indicated that 90% of 370 prospective jurors and two-thirds of those seated on the jury had an opinion as to guilt, and the accused unsuccessfully challenged for cause several persons accepted on the jury."<sup>66</sup>

<sup>65</sup> Supra note 58.

<sup>66</sup> Supra note 64, at 557.

The Court's refusal to reverse *Beck v. Washington*<sup>67</sup> clearly indicates that *Irvin v. Dowd*<sup>68</sup> was no radical departure from past precedents, but was rather an inescapable conclusion based on an extreme fact situation.

Note here, also, that in the *Beck* case the Court felt it significant that petitioner did not challenge for cause any of the jurors ultimately selected. The Court also quoted from *Darcy v. Handy*<sup>69</sup> to the effect that it should not be asking too much that the burden of showing the essential unfairness be sustained by the petitioner and that the showing be a "demonstrable reality," not just mere speculation. Neither Justice Frankfurter nor Justice White took part in the consideration or decision of the case; Justice Black joined by Chief Justice Warren dissented.

With the exception of *Sheppard v. Maxwell*, the Cleveland murder case which was just recently decided by the Supreme Court,<sup>70</sup> *Beck v. Washington*<sup>71</sup> was the last significant case wherein newspaper publicity was stated as the prime reason for asking for a new trial. There are, however, two television cases, *Rideau v. Louisiana*<sup>72</sup> decided in 1963 and *Estes v. Texas*<sup>73</sup> decided June 7, 1965. *Rideau* is not only another case of extreme facts, but it serves very well to show the possible difference between newspaper publicity and television publicity. While there is very little difference between a newspaper story and a news story being read by a television reporter, where, as in *Rideau*, an individual accused of a crime is shown on tele-

<sup>67</sup> Supra note 64.

<sup>68</sup> Supra note 58.

<sup>69</sup> Supra note 50.

<sup>70</sup> Supra note 34.

<sup>71</sup> Supra note 64.

<sup>72</sup> 373 U.S. 723, 10 L. ed. 2d 663, 83 S. Ct. 1417 (1963).

<sup>73</sup> 381 U.S. 532, 14 L. ed. 2d 543, 85 S. Ct. 1628 (1965).



vision actually confesses, the impact on the viewing public is far different than that of a newspaper story. A few hours after a combination bank robbery, kidnapping and killing in Louisiana, the petitioner, Wilbert Rideau, was apprehended by the police and incarcerated over night. The following morning a twenty-minute film with sound track was made of an interview in the jail between petitioner and the sheriff. In the course of the interview, the sheriff interrogated petitioner and petitioner admitted his responsibility for the robbery, kidnapping and murder. The film was shown over a local television station once each day for three consecutive days and was seen by a total audience of approximately 106,000 people. (This does not mean that 106,000 different people saw the interview, but only that there were a total of 106,000 viewers on the three occasions, some may have seen the interview two or three times.) The parish in which petitioner was tried had approximately 150,000 residents. There is no way of knowing how many of these 150,000 actually saw the film.

Petitioner's motion for a change of venue, based primarily on the television interview, was denied and he was convicted and sentenced to death on the charge of murder. Two members of the jury which convicted petitioner were deputy sheriffs of the parish in which the trial was held, and three members of that jury had stated on *voir dire* that they had seen the televised interview. Prior to the selection of these five jurors, petitioner had used all of the peremptory challenges allowed him, and his request that they be challenged for cause was denied.

The Court held that the question of who initiated the interview, whether it was petitioner, the representative of the State or some third party, was not important because the result in any case would be a denial of due process in refusing to grant the request for a change of venue. The Court stated:

"For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."<sup>74</sup>

The Court then went on to state:

"The case now before us does not involve physical brutality. The kangaroo court proceedings in this case involved a more subtle but no less real deprivation of due process of law. Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge. Yet in this case the people of Calcasieu Parish saw and heard, not once but three times, a 'trial' of Rideau in a jail, presided over by a sheriff, where there was no lawyer to advise Rideau of his right to stand mute."<sup>75</sup>

Of great significance in this case is the fact that the Court said it would not hesitate in holding that this was a denial of due process "without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury." This is significant because, prior to this time, much emphasis had been placed by the Court on the *voir dire* since it was felt that only through the *voir dire* could a reviewing court establish a particular bias or prejudice on the part of individual jurors. Without any substantial *voir dire* record, such prejudice would have to be presumed, a step the Court had heretofore been reluct-

<sup>74</sup> *Supra* note 72, at 726.

<sup>75</sup> *Ibid.*

ant to take. Here, however, the effects of the television interviews were so extreme that the situation was considered inherently prejudicial by the Court. Note also that this case, like *Irvin v. Dowd*<sup>76</sup> involved the publication of a confession. The facts of the case were peculiar to television and, because of the defendant's personal appearance, it would be difficult to find an analogous situation created by newspaper publicity.

Notwithstanding the extreme factual situation, Justices Clark and Harlan dissented stating that:

"Unless the adverse publicity is shown by the record to have fatally infected the trial, there is simply no basis for the Court's inference that the publicity, epitomized by the televised interview, called up some informal and illicit analogy to *res judicata*, making petitioner's trial a meaningless formality. See *Beck v. Washington*, 369 US 541, 8 L ed 2d 98, 82 S Ct 955 (1962)." <sup>77</sup>

The dissenting opinion went on to distinguish the situation in *Irvin v. Dowd* and finally stated:

"As we recognized in *Irvin*, however, it is an impossible standard to require that tribunal to be a laboratory, completely sterilized and freed from any external factors. The determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge. And when the jurors testify that they can discount the influence of external factors and meet the standard imposed by the Fourteenth Amendment, that assurance is not lightly to be discarded. When the circumstances are unusually compelling, as in *Irvin*, the assurances may be discarded, but 'it is not asking too

<sup>76</sup> Supra note 58.

<sup>77</sup> Supra note 72, at 729.

much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside.' " <sup>78</sup>

In 1965, in *Estes v. Texas*,<sup>79</sup> the Court reversed a conviction involving the televising and filming of the trial itself. There, again, petitioner himself was one of the television actors, as were the witnesses and the jury. *It should be understood at the outset that the Court granted certiorari only as to the questions emanating from allowing the trial to be televised. The Court specifically denied certiorari as to the question of pretrial publicity; therefore, a great deal of the opinions expressed by the various Supreme Court Justices are not pertinent to the subject here under study.* Nevertheless, the ultimate question was whether the due process clause of the Fourteenth Amendment had been violated in this case by allowing the Court proceedings to be televised. This is, therefore, another example of an abrogation of Fourteenth Amendment rights due to the activities of one of the news media. The Court reversed the lower court conviction by a five to four margin with five of the nine judges rendering separate opinions and with one Justice, in essence, rendering two opinions. In *Rideau*, the Court considered a set of circumstances so inherently prejudicial as to preclude the possibility of a fair trial, and it was not required that the circumstances of possible prejudice be tied to an actual fact of prejudice of particular jurors. On this point the Court in *Estes* stated:

"In *Rideau v. Louisiana*, 373 U.S. 723 (1963) this Court constructed a rule that the televising of a defendant in the act of confessing to a crime was inherently invalid under the Due Process Clause of the Fourteenth Amendment even without a showing of

<sup>78</sup> *Id.* at 733.

<sup>79</sup> Supra note 73.



prejudice or a demonstration of the nexus between the televised confession and the trial.”<sup>80</sup>

The Court then went on to make it clear that this was another case where the showing of actual prejudice was not a prerequisite to reversal:

“The State, however, says that the use of television in the instant case was ‘without injustice to the person immediately concerned,’ basing its position on the fact that the petitioner has established no isolatable prejudice in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case.”<sup>81</sup>

The Court mentioned *Rideau v. Louisiana*<sup>82</sup> and *Turner v. Louisiana*<sup>83</sup> and stated:

“In each of these cases the Court departed from the approach it charted in *Stroble v. California*, 343 U.S. 181 (1952), and in *Irvin v. Dowd*, 336 U.S. 717 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it.”<sup>84</sup>

The Court discussed separately the effect on the witnesses, the jurors, the judge and the defendant of televising the proceedings, and concluded that if any of the four

<sup>80</sup> *Id.* at 538.

<sup>81</sup> *Id.* at 542.

<sup>82</sup> *Supra* note 72.

<sup>83</sup> 379 U.S. 466, 13 L. ed. 2d 424, 85 S. Ct. 546 (1965).

<sup>84</sup> *Supra* note 73, at 543.

were affected by the presence of the television camera, the petitioner would not have been afforded due process. Therefore, it was the inherent prejudice in televising criminal trials that the Court sought to rectify. Justice Brennan, one of the four dissenting judges, noted in a “post-script” opinion that only four of the five justices voting for reversal considered televising criminal trials as “constitutionally infirm” under any circumstances and that the fifth judge voting for reversal, Justice Harlan, confined his objections to television in the courtroom in the subject case which was a “heavily publicized and highly sensational affair.”

Justice Stewart’s dissenting opinion expressed concern over the effect the majority opinion might have on future cases involving the First Amendment. “. . . I would be wary of imposing any *per se* rule which, in the light of future technology might serve to stifle or abridge true First Amendment rights.”<sup>85</sup> With regard to the scope of the Court’s review, Justice Stewart stated that three of the four separate constitutional claims were declined for review by the Court. As previously mentioned one of those which the Court refused to review was the claim that members of the jury “had received through the news media damaging and prejudicial evidence. . . .”<sup>86</sup> The dissent then stated that:

“Because of our refusal to review the petitioner’s claim that pretrial publicity had a prejudicial effect upon the jurors in this case, and because, insofar as the September hearings were an element of that publicity, the claim is patently without merit, that issue is simply not here. Our decision in *Rideau v. Louisiana*, 373 U.S. 723, therefore, has no bearing at all in this case.”<sup>87</sup>

<sup>85</sup> *Id.* at 604.

<sup>86</sup> Petition for Writ of Certiorari, question 3, p. 3.

<sup>87</sup> *Supra* note 73, at 610.



Stewart concluded by stating:

"The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms."<sup>88</sup>

*Estes v. Texas*,<sup>89</sup> and its impact on the news media, is discussed at length in appendix "D."

While the case of *Turner v. Louisiana*<sup>90</sup> was not a newspaper or a television case, it warrants mention if for no other reason than that it was so often cited in *Estes v. Texas*.<sup>91</sup> The case was in fact decided some six months prior to *Estes*. There the two principal witnesses for the prosecution were deputy sheriffs who throughout the three-day murder trial were in "intimate association" with the jurors in that the jury was placed in their charge, so that they ate with the jurors, conversed with them, and did errands for them. The Court stated that the jury's verdict must be based on evidence developed at the trial and that, under the circumstances of the relationship these witnesses for the prosecution enjoyed with the jurors, it would have been impossible for the jurors to have confined their deliberations to that evidence. The Court pointed out that the petitioner's fate depended on how much confidence the jurors placed in these two witnesses and the association the witnesses had with the jury as their "official guardians" during the entire period of the trial precluded the possibility of a fair determination by the jurors.

<sup>88</sup> *Id.* at 614.

<sup>89</sup> *Supra* note 73.

<sup>90</sup> *Supra* note 83.

<sup>91</sup> *Supra* note 73.

Through the foregoing cases the development of the law in this area can clearly be seen. While it would be difficult to deny that the Court in recent years has afforded the defendant a greater degree of protection from influences emanating from without the courtroom, the fact still stands that in only two cases involving a conviction in a state court, *Irvin v. Dowd*<sup>92</sup> and the recent *Sheppard v. Maxwell* case,<sup>93</sup> has the Supreme Court reversed the lower court on due process grounds because a fair trial in the particular locality involved was made impossible by publicity, primarily newspaper, surrounding the trial. The two important cases wherein the Court spoke of inherent prejudice as opposed to specific prejudice involved television publicity, and in those cases the defendants themselves were shown to the public. The law, set down in *Reynolds v. United States*<sup>94</sup> with regard to newspaper publicity, therefore, remains substantially intact. As can be seen in Appendix E to this report, dealing exclusively with *Sheppard v. Maxwell*,<sup>95</sup> the Supreme Court has not, in its latest opinion, changed its views in this area. The Court continues to consider the present legal safeguards as adequate to protect an accused and does not attempt to limit in any way Freedom of the Press.

<sup>92</sup> *Supra* note 58.

<sup>93</sup> *Supra* note 34.

<sup>94</sup> 98 U.S. 145, 25 L. ed. 244 (1878).

<sup>95</sup> *Supra* note 34.

## ATTACHMENT A

INFORMATION ON NEWS MEDIA COVERAGE OF CRIMES, THOSE ACCUSED OF CRIMES, AND CRIMINAL TRIALS, AS FOUND IN THE WEST REPORTER SYSTEM, WITH WEST "KEY NUMBERS" AND SAMPLE CASES INCLUDED.

1. *Newspapers*: Access to or reading as ground for new trial: Criminal Law § 924-1/2 (4).
  - (a) 385 P. 2d 592
  - (b) 193 A. 2d 817
2. *Newspapers*: On publication of newspaper article lauding state expert witness: Criminal Law § 867.
  - (a) 179 F. 2d 646, affirmed 71 S. Ct. 581
  - (b) 229 F. 2d 216
  - (c) 218 F. 2d 97, *cert granted* 75 S. Ct. 603, *cert dismissed* 76 S. Ct. 191
3. *Newspapers*: New trial because papers found in jury room: Criminal Law § 1176.
  - (a) 120 P. 2d 814
4. *Newspapers*: Receiving by jury: Criminal Law § 855 (5).
  - (a) 225 F. 2d 220
  - (b) 59 So. 2d 582
  - (c) 247 S.W. 2d 952
  - (d) 241 P. 2d 308
  - (e) 46 N.W. 2d 158
  - (f) 225 S.W. 2d 975
5. *Newspapers*: Statement by Court respecting not read-articles: Criminal Law § 957 (5).
  - (a) 106 F. Supp. 906
  - (b) 194 F. 2d 1, *cert den.* 72 S. Ct. 1042
  - (c) 106 S.W. 2d 18

6. *Newspapers*: Continuance on ground veniremen read newspaper articles: Criminal Law § 591.
  - (a) 65 So. 2d 525
  - (b) 199 F. 2d 107
  - (c) 204 F. 2d 105, *cert den.* 74 S. Ct. 36
  - (d) 194 F. 2d 623, *cert den.* 72 S. Ct. 1058
  - (e) 113 F. Supp. 253
7. *Newspapers*: Admonition to refrain from reading. Criminal Law § 852.
  - (a) 167 P. 2d 535
8. *Newspapers*: New trial for Court's failure to instruct jury as to duties in respect to reading: Criminal Law § 922 (2).
  - (a) 81 N.E. 2d 445
9. *Newspapers*: Jury picture in paper: Criminal Law § 1176.
  - (a) 69 N.E. 2d 39
10. *Newspapers*: Reading by jury during trial: Criminal Law § 1174 (1, 6).
  - (a) 72 N.E. 2d 286, *cert den.* 67 S. Ct. 1738
  - (b) 46 N.E. 2d 103
  - (c) 20 N.W. 2d 205
  - (d) 54 So. 2d 921, *cert den.* 72 S. Ct. 564
11. *Newspapers*: Accounts of trial communicated to jury: Criminal Law §§ 1144 (15), 1163 (6).
  - (a) 212 F. 2d 8, *cert den.* 75 S. Ct. 125
  - (b) 261 S.W. 2d 784
  - (c) 132 F. Supp. 69
  - (d) 279 P. 2d 898
  - (e) 72 N.E. 2d 286, *cert den.* 67 S. Ct. 1738

12. *Newspapers: Change of venue due to newspaper accounts: Criminal Law § 121.*

- (a) 225 F. 2d 123, *cert. den.* 76 S. Ct. 197
- (b) 205 F. 2d 343, *cert. den.* 74 S. Ct. 50
- (c) 169 F. 2d 739, *cert den.* 69 S. Ct. 51

13. *Newspapers: Jury prejudice or bias on newspaper disclosure: Criminal Law § 126 (1).*

- (a) 161 F. 2d 337, *cert den.* 67 S. Ct. 1744
- (b) 13 F.R.D. 296
- (c) 58 So. 2d 623
- (d) 288 P. 2d 57

14. *Newspapers: Publicity prejudicing; interview after verdict to determine: Criminal Law § 957 (1).*

- (a) 290 N.W. 534

15. *Newspapers: Discharge of jury panel on ground that prospective jurors had read newspaper accounts: Jury § 116.*

- (a) 220 F. 2d 252, *cert den.* 76 S. Ct. 53
- (b) 46 So. 2d 262
- (c) 47 N.W. 2d 349

16. *Newspapers: Disqualification of jury members due to opinions founded: Jury §§ 100, 103 (11-14).*

- (a) 46 N.W. 2d 508
- (b) 58 S.E. 2d 288, *cert den.* 70 S. Ct. 1013
- (c) 214 F. 2d 950

17. *Newspapers: Criminal prosecution; prospective jurors not permitted to state what they read on voir dire: Jury § 131 (7).*

- (a) 57 So. 2d 888, *cert den.* 73 S. Ct. 58
- (b) 35 N.W. 2d 142
- (c) 265 S.W. 2d 593, *cert den.* 74 S. Ct. 534

18. *Newspapers: Examination by Court of jury as to whether they had seen newspaper articles: Jury § 131 (16).*

- (a) 203 F. 2d 904
- (b) 51 S.S. 2d 13
- (c) 229 S.W. 2d 582

19. *Newspapers: Fair Trial; preventing jury from reading paper: Jury § 100.*

- (a) 46 N.W. 2d 508
- (b) 58 S.E. 2d 288 *cert den.* 71 S. Ct. 286
- (c) 108 F. 2d 625



## ATTACHMENT B

*Selected State Cases Relating to Newspaper Coverage of  
Crimes Causing Jurors to Acquire Opinions Regarding  
Defendant's Guilt or Innocence*

## 1658—1896

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| Denver v. Moynahan                          | 8 Colo. 56, Pac. 811 |
| State v. Dent                               | 7 S. 694             |
| Sane v. LeDoff                              | 15 So. 397           |
| People v. O'Neill                           | 65 N.W. 540          |
| Parker v. State                             | 55 Miss. 414         |
| Commonwealth v. Beucher                     | 10 Pa. Co. Ct. 3     |
| State v. Summers                            | 15 S.E. 369          |
| Miller v. State                             | 20 S.W. 1103         |
| State v. George                             | La. Ann. 786         |
| Zimmerman v. State                          | 56 Md. 536           |
| Palmer v. People                            | 4 Neb. 68            |
| Phelps v. People                            | 72 N.Y. 334          |
| State v. Kilgore                            | 93 N.C. 533          |
| Commonwealth v. Morrow                      | 9 Phila. 583         |
| Same v. Work                                | 3 Pitt. R. 493       |
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| Blackman v. State                           | 7 S.E. 626           |
| Pemberton v. State                          | 38 N.E. 1096         |
| Davenport Gas Light v.<br>City of Davenport | 13 Iowa 229          |
| State v. Vatter                             | 32 N.W. 506          |
| State v. Smith                              | 34 N.W. 597          |
| State v. Jackson                            | 37 La. Ann. 768      |
| Foots v. State                              | 7 Ohio St. 471       |
| State v. Clark                              | 42 Vt. 629           |
| In Re Epes                                  | 5 Grat. 676          |
| Little v. Commonwealth                      | 25 Grat. 921         |
| Thompson v. Updegraff                       | 3 W.Va. 629          |

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| Dimmick v. U.S.       | 121 F. 638                           |
| People v. Owens       | 56 P. 251                            |
| People v. Nunley      | 76 P. 45                             |
| People v. Sowell      | 78 P. 717                            |
| State v. Brady        | 69 N.W. 290                          |
| State v. Herbert      | 28 S. 898                            |
| State v. Reed         | 38 S.W. 574                          |
| State v. Hunt         | 43 S.W. 389                          |
| State v. Bronstine    | 49 S.W. 512                          |
| State v. McGinnis     | 59 S.W. 83                           |
| State v. Forsha       | 88 S.W. 746                          |
| State v. Sakes        | 89 S.W. 851                          |
| Bolin v. Neb.         | 71 N.W. 444                          |
| Jahnke v. State       | 94 N.W. 158—reversed 105<br>N.W. 154 |
| State v. Simas        | 62 P. 242                            |
| Wilson v. State       | 57 A. 954                            |
| Bratt v. State        | 41 S.W. 624                          |
| Morrison v. State     | 51 S.W. 358                          |
| Kegans v. State       | 955 W. 122                           |
| Smith v. Commonwealth | 6 Grat. 696                          |
| State v. Harris       | 60 P. 58                             |
| State v. Willis       | 41 A. 820                            |
| State v. Young        | 74 N.W. 693                          |
| People v. Warner      | 82 P. 196                            |
| Haur v. People        | 46 N.E. 127                          |
| Shields v. State      | 49 N.E. 351                          |
| State v. Start        | 56 P. 15                             |
| State v. Kellogg      | 29 So. 285                           |
| People v. Quimby      | 96 N.W. 1061                         |
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| Thomas v. State    | 43 S. 371     |
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| King v. State     | 187 N.W. 934                                  |
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| Sapp v. State     | 223 S.W. 459                                  |
| Willis v. State   | 239 S.W. 212                                  |
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| Union Electric Light and<br>Power Co. v. Snyder<br>Estate Co. | 65 F. 2d 297   |
| Spear v. State  | 44 S.W. 2d 663 |
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| People v. Wallace   | 59 P. 2d 115    |
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| Medley v. U.S.     | 155 F.2d 857, 81 U.S. App. D.C. 85, cert. denied 66 S. Ct. 1377, 328 U.S. 873, 90 L. Ed. 1642, rehearing denied 67 S. Ct. 35, 329 U.S. 822, 91 L. Ed.                 |
| Finnegan v. U.S.   | 204 F. 2d 105, cert denied 74 S. Ct. 36, 346 U.S. 821, 98 L. Ed. 347, rehearing denied 74 S. Ct. 118, 346 U.S. 880, 98 L. Ed. 387                                     |
| Darcy v. Handy     | 130 F. Supp. 270, affirmed 244 F. 2d 540, affirmed 76 S. Ct. 965, 351 U.S. 454, 100 L. Ed.  |
| Buchanan v. State  | 218 S. W.2d 700   |
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| State v. Fouquette | 221 P. 2d 404, 67 Nev. 505, cert. denied Fouquette v. State of Nev., 71 S. Ct. 799, 341 U.S. 932, 95 L. Ed. 1361, cert. denied 72 S. Ct. 369, 342 U.S. 928, 96 L. Ed. |
| State v. Steadman  | 59 S.E. 2d 168, 216 S.C. 579, cert. denied 71 S. Ct. 78, 340 U.S. 850, 205, 340 U.S. 849, 95 L. Ed.   |
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| People v. Duncan   | 350 P. 2d 103   |
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JAN 23 1976

MICHAEL BRADY JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1975.

**No. 75-817**

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-  
HERALD COMPANY; THE JOURNAL-STAR PRINT-  
ING CO.; WESTERN PUBLISHING CO.; NORTH  
PLATTE BROADCASTING CO.; NEBRASKA BROAD-  
CASTERS ASSOCIATION; ASSOCIATED PRESS;  
UNITED PRESS INTERNATIONAL; NEBRASKA PRO-  
FESSIONAL CHAPTER OF THE SOCIETY OF PRO-  
FESSIONAL JOURNALISTS/SIGMA DELTA CHI;  
KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES  
HUTTENMAIER; WILLIAM EDDY;

*Petitioners,*

vs.

THE HONORABLE HUGH STUART, JUDGE, DISTRICT  
COURT OF LINCOLN COUNTY, NEBRASKA,

*Respondent.*

**BRIEF FOR TRIBUNE COMPANY  
AS AMICUS CURIAE.**

DON H. REUBEN,  
LAWRENCE GUNNELS,  
JAMES A. KLENK,

200 East Randolph Drive,  
Chicago, Illinois 60601,  
(312) 861-2000,

*Attorneys for Tribune Company.*

Of Counsel:

KIRKLAND & ELLIS,  
200 East Randolph Drive,  
Chicago, Illinois 60601.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1975.

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**No. 75-817.**

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NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-  
HERALD COMPANY; THE JOURNAL-STAR PRINT-  
ING CO.; WESTERN PUBLISHING CO.; NORTH  
PLATTE BROADCASTING CO.; NEBRASKA BROAD-  
CASTERS ASSOCIATION; ASSOCIATED PRESS;  
UNITED PRESS INTERNATIONAL; NEBRASKA PRO-  
FESSIONAL CHAPTER OF THE SOCIETY OF PRO-  
FESSIONAL JOURNALISTS/SIGMA DELTA CHI;  
KILEY ARMSTRONG; EDWARD C. NICHOLLS; JAMES  
HUTTENMAIER; WILLIAM EDDY;

*Petitioners,*

vs.

THE HONORABLE HUGH STUART, JUDGE, DISTRICT  
COURT OF LINCOLN COUNTY, NEBRASKA,

*Respondent.*

---

**BRIEF FOR TRIBUNE COMPANY  
AS AMICUS CURIAE.**

---

*May It Please the Court:*

The Tribune Company respectfully submits this brief *amicus curiae*. All of the parties to the cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 42.

### INTEREST OF AMICUS.

Tribune Company is the parent-owner of Chicago Tribune Company, publisher of the *Chicago Tribune*, and New York News, Inc., publisher of the *New York News*. The *Chicago Tribune* and the *New York News* are two of the largest circulating daily and Sunday metropolitan newspapers in the United States; both newspapers are deeply and vitally committed to the preservation and advancement of First Amendment freedom of the press. Past cases in which this *amicus* has participated or appeared on behalf of press freedom include *Near v. Minnesota*, 283 U. S. 697 (1931); *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964); *Associated Press v. Walker*, 388 U. S. 130 (1967); *Miami Herald Pub. Co. v. Tornillo*, 418 U. S. 241 (1974); *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N. E. 86 (1923).

### ARGUMENT.

The petitioners' amended petition for certiorari succinctly demonstrates that the Nebraska Supreme Court's decision is an unprecedented departure from the holdings of this Court under the First and Fourteenth Amendments. If it were necessary and appropriate to do so in this case, we would argue the petitioners' view of the Constitution. However, rather than duplicate that discussion or assume the role of a Greek chorus, we shall focus on what is empirically known about the impact of pretrial publicity on jury verdicts. We believe a strong dash of reality is needed to place this case in proper perspective.

The problem of reconciling the First Amendment freedom of the press to report on judicial proceedings with the Sixth Amendment right of an accused to a fair trial is too often viewed as a Gordian knot. Regrettably, in the bulk of the papers before the Court in this case the issue has been cast in terms of absolutes—The First Amendment v. The Sixth Amendment. In our judg-

ment, however, this Court is not confronted with a record upon which it is appropriate to assess whether there is in fact a head-on clash of fundamental constitutional rights that must be resolved. The Court is not compelled on this record to exercise the wisdom of Solomon and choose between an irresistible force and an immovable object.

### I. The True Impact of Media Publicity on Jury Verdicts Is Unknown.

At the heart of the current "fair trial—free press" controversy is the unverified and taken-for-granted premise that pretrial publicity in a sensational criminal case will indelibly bias prospective jurors against the defendant. This *a priori* assumption ignores that, in reality, very little is known about whether pretrial publicity in fact compromises the impartiality of future jurors. What little sociological and psychological data there is appears inconclusive. See Connors, *Prejudicial Publicity: An Assessment*, Journalism Monographs, No. 41, September, 1975 at 20; Comment, *The Free Press-Fair Trial Controversy—An Empirical Approach*, 2 Conn. L. Rev. 351 (1969).

Kalven and Zeisel's Chicago Jury Project Study, *The American Jury* (1966), is perhaps the definitive treatise to date on the American jury system. This Project analyzed the factors that influenced jury verdicts in 3,576 actual criminal trials. Although the Project's questionnaires contained no specific reference to pretrial publicity, not a single one of the 550 judges reporting on the trials suggested that pretrial publicity had any influence whatsoever on jurors' verdicts. From his experience on the Project, Professor Kalven has concluded "that the jury is a pretty stubborn, healthy institution not likely to be overwhelmed by a remark of counsel or a remark in the press." Letter to Judge Herbert F. Goodrich cited in D. Gillmor, *Free Press and Fair Trial*, 206-7 (1966).

The few empirical studies that have attempted to assay the impact of pretrial publicity on jury verdicts offer muddled and



conflicting results. Professor Rita Simon, for example, examined the responses of two groups of experimental jurors to a tape recorded trial. One group was exposed to "sensational" press accounts that included the defendant's prior criminal record; the other group received neutral press reports. Prior to trial, 67 percent of the sensational group believed the defendant guilty, while only 37 percent of the neutral group believed him guilty. After the trial, only 25 percent of the sensational group believed the defendant guilty—a reduction of 42 percent—and 22 percent of the neutral group believed him guilty. These findings plainly suggest that the impact of pretrial publicity on jury verdicts is negligible at best. Cited in Wilcox, *The Press, The Jury, and the Behavioral Sciences*, Journalism Monographs, No. 9, October, 1968. See generally, Grady, *Prejudicial Pretrial Publicity: Its Effect on Jurors* (Master's Thesis Northwestern Univ. 1972); Tans & Chaffee, *Pretrial Publicity and Juror Prejudice*, 43 Journalism Q. 547 (1966); Kline & Jess, *Prejudicial Publicity: Its Effect on Law School Mock Juries*, 43 Journalism Q. 113 (1966).

Data gathered by Padewar-Singer and Barton, on the other hand, suggest some correlation between "prejudicial" pretrial publicity and guilty verdicts. Again, jurors were exposed to differing news accounts and a tape recorded trial. The "prejudicial" news accounts referred to the defendant's prior criminal record and a confession. After trial, 78 percent of the jurors exposed to the prejudicial account believed the defendant guilty, while 55 percent of the jurors exposed to the neutral account believed him guilty. Cited in Connors, *Prejudicial Publicity: An Assessment*, Journalism Monographs, No. 41, September, 1975. See generally, Padewar-Singer, Singer & Singer, *Voir Dire by Two Lawyers*, 57 Judicature 386 (1974); Smith & Smith, *How Not to Get a Fair Trial*, Psychology Today, May, 1974 at 86.

The significance of the foregoing studies and the cited related authorities lies in their demonstration that even among un-

biased experts there is sharp disagreement over the effect of publicity on criminal trials. Setting definitive standards on such sociological quicksand is risky business. All that one can conclude is that a guilty verdict does not ineluctably flow from prejudicial pretrial publicity. Most certainly there is no basis, either in proven fact or in ivory tower logic, for the *a priori* assumption that a given amount of publicity renders the defendant's conviction inevitable.

## II. There Is No Evidence That Publicity Presented Any Serious Threat in This Case.

This Court has uniformly held that the press may not be restrained from reporting or commenting on pending judicial proceedings unless there is a "serious and imminent danger to the impartial administration of justice." *Craig v. Harney*, 331 U. S. 367 (1947); *Pennekamp v. Florida*, 328 U. S. 331, 334-36 (1946); *Bridges v. California*, 314 U. S. 252, 263 (1943). As the Court declared in *Pennekamp*:

"Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the border-line instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." 328 U. S. at 347.

The guiding principle to be distilled from these and other First Amendment decisions of this Court is that the right of the press to report what transpires concerning a pending judicial proceeding will not be disturbed in any way unless there has been a clear and convincing showing that judicial action is absolutely necessary to insure the fair administration of justice.

The trial judge and the Nebraska Supreme Court, we submit, paid no more than lip service to these well-settled principles of



First Amendment adjudication. The record in the instant case is singularly lacking in any clear indicia that the defendant Simants' Sixth Amendment right to a fair trial was imperiled. With Simants' counsel consenting to the prosecution's motion to restrict pretrial press coverage, Judge Stuart's order was entered as if by stipulation of the parties. No attempt was made to determine the actual impact of publicity on the community. No attempt was made at that time to impanel a jury. And no attempt was made to assess whether there was or could be a sufficient hiatus between the crime and trial to solve any alleged publicity problem that might be encountered.

All that appears to have been offered were the self-serving statements of the county judge who summarily ordered the initial ban on publicity and certain newspaper accounts that connected the defendant with the commission of a heinous crime.<sup>1</sup> Such a "showing" could be made in almost any prosecution for a violent crime. If this is all that is required to abridge or stifle preferred First Amendment rights, those rights are supported by the thinnest of reeds. The First Amendment has become a wisp of straw instead of a cornerstone of freedom.

We entertain grave doubts as to whether pretrial publicity can ever be shown to pose a serious and imminent danger to the impartial administration of justice at the very outset of a criminal prosecution. Common sense as well as the available empirical data suggest that pretrial publicity is only likely to become an issue in the rare, celebrity case. Judge Wright, for example, has estimated that the problem arises in only "a small fraction of a small fraction of criminal cases." Wright, *Fair Trial—Free Press*, 38 F. R. D. 435, 437 (1965). The paradigms of Dr. Sam Sheppard and Billie Sol Estes are often cited;<sup>2</sup> however, even

1. The opinion of the Nebraska Supreme Court is reproduced at 44a of the Petitioner's Amended Petition for Certiorari.

2. Any student of criminal justice administration must recognize that these cases are aberrations. The conduct of the judge in the *Sheppard* case was in many respects itself so outrageous that it alone compelled a new trial. *Sheppard v. Maxwell*, 384 U. S. 333, 352-54, 358 n. 11 (1966).

the *cause celebre* defendant is not necessarily prejudiced by the media, as is attested by the recent acquittals of John Mitchell, Maurice Stans, and John Connally during the zenith of Watergate.

The vast bulk of all crime-related pretrial publicity occurs at the time a criminal suspect is arrested or indicted. A. B. A. Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press*, 166, 195 (Tentative Draft 1966); Friendly & Goldfarb, *Crime & Publicity*, 61 (1967). The accused will not be tried for the crime for several months—indeed, up to a year may elapse between indictment and trial. See *United States v. Isaacs*, 493 F. 2d 1124 (7th Cir. 1974). Due to the passage of time and the defects of human memory, the impact of this initial flurry of publicity upon jurors is *de minimis*, if extant at all. LeWine, *What Constitutes Prejudicial Publicity in Pending Cases?* 51 A. B. A. J. 942, 945 (1965); Levine & Murphy, *The Learning and Forgetting of Controversial Material*, 38 J. Abnormal & Social Psych. 507 (1943). Thus, any judgment as to the seriousness of possible prejudice prior to actual jury selection will necessarily be premature and was so here.

In short, we submit that respondent has succumbed to the inherent predilection of a trial judge to avoid reversal at almost any price. At best, his order was entered on mere conjecture; there was no showing of serious and imminent peril to the defendant Simants' Sixth Amendment rights. There was not even the color of an attempt to assess if there was a so-called publicity problem.

### III. Prior Restraint Is Unjustified.

Whether pretrial publicity may in fact pose a genuine threat to a fair trial can only be judged when the venire is in the courtroom and jury selection begins. This is the first opportunity the trial judge has to make an objective and realistic appraisal of the actual impact of the news coverage. By polling the veniremen upon *voire dire*, the trial judge can directly glean

the effect of publicity, if any, on prospective jurors. While the judge cannot absolutely tell that jurors are in fact biased, he can determine if there is a significant likelihood that an unbiased jury cannot be impaneled. Compare *Irvin v. Dowd*, 366 U. S. 717, 727 (1961) with *Beck v. Washington*, 369 U. S. 541, 556-57 (1962).

Upon such inquiry, if a judge concludes that pretrial publicity endangers the fairness or even the appearance of fairness of the trial, he still has no need to "gag" the media. The judge can either continue the case until the controversial publicity subsides or order a change of venue to a locale where the impact of the publicity is not so pronounced.<sup>3</sup> Moreover, the judge at that point is in a position, informally and upon an *ad hoc* basis, to dialogue with the press. An understanding of the problem in the context of reality rather than conjured horrors should and, we think, would lead in most instances to an accommodation of the interests involved. But here there was no First Amendment sensitivity. The Nebraska Supreme Court and Judge Stuart did not even consider the employment and efficacy of these less drastic means. See, e.g., *United States v. Robel*, 389 U. S. 258, 268 (1967); *Shelton v. Tucker*, 364 U. S. 479, 488 (1960).

In *Sheppard v. Maxwell*, 384 U. S. 333 (1966) the Court recommended the very alternative remedies that we urge should have been employed here if in truth needed. Nowhere in *Sheppard* did the Court suggest that newspapers be enjoined from

3. These solutions to the pretrial publicity problem necessarily entail delay, but we see no threat to the criminal defendant's Sixth Amendment right to a speedy trial. Congress has authorized federal district judges to continue criminal trials if such action is necessary to further "the ends of justice," Speedy Trial Act of 1974, Pub. L. No. 93-619, § 3161(h)(8)(A) (January 3, 1975), and this Court has held that whether there has been a denial of this Sixth Amendment right depends in large part upon the reason the trial of the defendant is delayed. See, e.g., *Barker v. Wingo*, 407 U. S. 514, 531 (1972). We can imagine no more cogent justification than that delay is necessary to secure a jury that is perceived to be bias-free.

publicizing the facts and circumstances of a pending criminal prosecution. Rather, the Court admonished that:

"Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, *the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.*" 384 U. S. at 362-63. (Emphasis added.)

Nothing has occurred since 1966 to alter this view. Knowledge of the true impact of pretrial publicity on jury verdicts remains uncertain. Common sense, as this Court has recognized, still tells us that human memories fade and that, as the time span between publicity and trial increases, the likelihood of prejudice rapidly diminishes. See *Beck v. Washington*, 369 U. S. 541 (1962) (5 months); *Stroble v. California*, 343 U. S. 181, 191, 195 (1952) (6 weeks). Moreover, there is no evidence contrary to the conventional view that the impact of publicity is to a great degree geographically localized so that a change in trial situs can solve any problem that does develop. See *Shepherd v. Florida*, 341 U. S. 50, 52-53 (1951) (Jackson, J., concurring).

We see no reason to depart from the standards this Court postulated in *Sheppard v. Maxwell*. No compelling justification or change of circumstance has been advanced to warrant the unprecedented resort to prior restraint.

#### IV. The Result Here and the Future of Press Freedom.

The importance of this case, we submit, is not that it can or will reconcile First and Sixth Amendment rights. To the contrary, there has not been even a *prima facie* showing that



pretrial press coverage has jeopardized the defendant Simants' right to a fair trial. Rather, the overriding significance of this case lies in the fact that this Court has never before been asked to jettison or subordinate First Amendment rights on such a flimsy basis. The Court need look no further for grounds to reverse.

There may come a time when the Court will be compelled to make the hard choice between the values of the First and Sixth Amendments. If that decision is to be made, we think that all the interests at stake will be better served if the courts have first thoroughly and objectively documented the actual impact of pretrial publicity upon prospective jurors by meaningful voir dire examinations. Over time, the efficacy of the remedies suggested in *Sheppard* can be appraised and the frequency of the problem gauged in the informed light of experience.<sup>4</sup> If, as we suspect, the incidence of true inability to secure a fair trial occurs, if at all, only once in a decade or so, the Court may decide not to attempt to square the circle, but to adopt the alternative suggested by Professor John Hart Ely in *Trial By Newspaper & Its Cures*, Encounter, March, 1967 at 92:

"Once in a while (a very long while, given the availability of continuance and venue change) there may arise a case so sensational that all the procedural devices in the world will not be able to guarantee the defendant a jury which has not been touched by the publicity. In such a case, if the press is to be left free and the right to a fair trial preserved, the only alternative will be to let the de-

4. Another relevant factor to place in the scale is the distinct and disturbing possibility that criminal defendants could well be harmed more than helped by judicial censorship of pretrial publicity. When a sensational or horrendous crime is committed, particularly in a smaller community or rural area, followed by an official ban or blackout of media news reporting, rumor and gossip quickly become the order of the day. Friendly & Goldfarb, *Crime and Publicity*, 79 (1967). As wartime experience with news censorship in this country has demonstrated, "Rumor flies in the absence of news . . .," and minor facts or half-truths soon become exaggerated to shocking and horrifying proportions. Allport and Postman, *The Psychology of Rumor*, 15 (1947). See also Lord, *Day of Infamy*, 202-03 (1957).

fendant go free. The freeing of a man who may well be guilty is not a desirable occurrence. But if it is the only way the two fundamental rights can be preserved, again, is it not worth the price?"

In sum, we believe that the Court need not here reach the "tough" question of whether the First or the Sixth Amendment must prevail where a true conflict of these fundamental rights has not been shown. Were this case to present that issue we have no doubt that the First Amendment must prevail. To silence the press in deference to the accused is the British way. See, e.g., Friendly & Goldfarb, *Crime & Publicity*, 141-57 (1967); Gillmor, *Free Press and Fair Trial in English Law*, 22 Wash. & Lee L. Rev. 17 (1965). Our American hierarchy of values has no place for such censorship of the press. *Bridges v. California*, 314 U. S. 252, 264-65 (1941). But we respectfully submit that it would be judicially intemperate and most premature to reach that kind of issue on this record.

### CONCLUSION.

For the foregoing reasons, we respectfully submit that the judgment of the Nebraska Supreme Court should be reversed.

Respectfully submitted,

DON H. REUBEN,  
LAWRENCE GUNNELS,  
JAMES A. KLENK,  
200 East Randolph Drive,  
Chicago, Illinois 60601,  
(312) 861-2000,  
*Attorneys for Tribune Company.*

Of Counsel:

KIRKLAND & ELLIS,  
200 East Randolph Drive,  
Chicago, Illinois 60601.

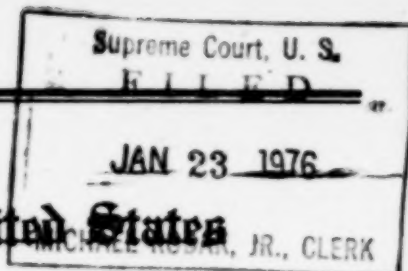
January 22, 1976.



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1975

No. 75-817



NEBRASKA PRESS ASSOCIATION, *et al.*,

*Petitioners,*

—v.—

THE HONORABLE HUGH STUART, JUDGE  
District Court of Lincoln County, Nebraska,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF  
NORTHERN CALIFORNIA, AND THE NEBRASKA CIVIL  
LIBERTIES UNION AS AMICI CURIAE**

MELVIN L. WULF

JOEL M. GORA

American Civil Liberties  
Union

22 East 40th Street  
New York, N. Y. 10016

DENNIS R. KEEFE

c/o Nebraska Civil  
Liberties Union

1030 Q Street  
Lincoln, Neb. 68501

CHARLES C. MARSON

JOSEPH REMCHO

American Civil Liberties  
Union Foundation of  
Northern California, Inc.  
814 Mission St., 3d Floor  
San Francisco, Cal. 94103

BRENT A. BARNHART

American Civil Liberties  
Union of Northern  
California, Inc.

1220 "H" Street, #103  
Sacramento, Cal. 95814

*Attorneys for Amici Curiae*

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IN THE  
SUPREME COURT OF THE UNITED STATES

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October Term 1975

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No. 75-817

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NEBRASKA PRESS ASSOCIATION, et al.,  
Petitioners,

v.

THE HONORABLE HUGH STUART, JUDGE  
District Court of Lincoln County, Nebraska,  
Respondent.

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On Writ of Certiorari  
to the Supreme Court of Nebraska

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,  
THE AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF NORTHERN CALIFORNIA,  
and the NEBRASKA CIVIL LIBERTIES UNION  
AS AMICI CURIAE

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INTEREST OF AMICI <sup>1/</sup>

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members. The Nebraska Civil Liberties Union serves as the statewide affiliate. The ACLU is dedicated solely to defending the safeguards of the Bill of Rights. Central among those protections is the First Amendment's guarantee of a free press, a condition prerequisite to the continued maintenance of a free society. No less important are those provisions of the Bill of Rights designed to insure the right of a criminal defendant to a fair trial before an impartial tribunal. The ACLU has long been concerned with the vindication of both sets of rights. We participated as amicus curiae in New York Times Co. v. United States, 403 U.S. 713 (1971), urging the invalidity of the prior restraints at issue there. And we likewise joined in Sheppard v. Maxwell, 384 U.S. 333 (1966) urging that the petitioner had been deprived of the right to a fair trial. In addition, the ACLU has devoted a considerable amount of study to the problem of assuring the defendant's right to a fair trial without intruding upon the necessary prerogatives of a free press to report fully about the criminal justice process. That deliberation resulted

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<sup>1/</sup> Letters of consent from all parties to the filing of this brief are being filed with the Clerk of the Court.

in the adoption of a policy statement on "Prejudicial Pre-Trial Publicity," which we are appending to this brief.

The American Civil Liberties Union Foundation of Northern California, the Northern California regional affiliate of the national ACLU, has a particular interest in the resolution of the issues here. It has been involved in gag order litigation for years: see, e.g., Hamilton v. Municipal Court, 270 Cal.App.2d 797 (1969) (upholding order gagging defendants and student body of University of California at Berkeley); People v. Green, Nos. L28145F-L28150 (Municipal Court of San Francisco, 1974) (gagging press in "Zebra" trial). It has pending before this Court a Petition for Writ of Certiorari testing an order of the United States District Court for the Eastern District of California enjoining in 26 California counties the showing of the film "Manson" in alleged protection of the right of fair trial of Lynette Fromme, respondent in Evans v. Fromme, No. 75-957, O.T. 1975.



STATEMENT OF THE CASE

Petitioners, various Nebraska publishers, broadcasters, journalists, wire services, and media associations, were ordered by the County Court, District Court and Supreme Court of Nebraska not to publish any but a short list of sanitized information relating to a pending criminal trial.

The prosecution and the defense in State v. Simants, B-2904, joined in seeking those orders in the criminal prosecution of Simants for alleged murder and sexual assault. From December 1, 1975, until January 8, 1976, when a trial jury was empaneled, petitioners were subject to an order of the Nebraska Supreme Court prohibiting the publication of:

- [1] Confessions or admissions against interest made by the accused to law enforcement officials;
- [2] Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media; and
- [3] Other information strongly implicative of the accused as the perpetrator of the slayings.

Amended Petition ("AP"), 64a.

These prohibitions were effective as to events prior to the issuance of the order (December 1, 1975).

From October 27 to December 1, 1975, petitioners were subject to greater restraint from an earlier order of the Nebraska District Court, as modified by a stay issued on November 21, 1975, by Mr. Justice Blackmun. (AP 9a-17a; 24a-25a; 38a-42a.) From October 23 to October 27, 1975, petitioners were subject to a still more restrictive order issued by the County Court (AP 1a-8a).

The information that petitioners were thus forbidden to publish, on pain of contempt, embraced nearly every newsworthy aspect of the Simants trial, including as it did not only the three categories of publication forbidden by the Nebraska Supreme Court but also (4) technical evidence from a prosecution witness (AP 10a); (5) identity of victims of, or details of, alleged sexual assaults (AP 11a); (6) the nature and limitations of the gag orders themselves (AP 11a); and (7) any publication disapproved by the Nebraska Bar-Press Guidelines (AP 4a-8a; 13a-17a). These Guidelines are a lengthy voluntary agreement finding "generally inappropriate" the publication of many newsworthy facts relating to criminal trials, from opinions of guilt or character, prior criminal records, and results of tests to "statements...relating to...other matters which, if reported, would likely interfere with a fair trial." (AP 13a-15a.)

In justification of the original order,

the County Court, on a record consisting of articles from three daily papers (AP 58a-59a), found "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury..." (AP 1a). The District Court, adding to this record only the testimony of the County Court judge (AP 58a), found "a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." The Nebraska Supreme Court found, on no greater record, justification for the order of the District Court (AP 61a-64a), without embracing either standard used in the courts below.

On December 12, 1975, this Court granted certiorari to review the orders of the courts below but declined to expedite consideration of the case or to stay the December 1, 1975, order of the Nebraska Supreme Court then in effect. The latter order expired when the jury in State v. Simants was empaneled on January 8, 1976. Thereafter, the jury found the defendant guilty.

#### ARGUMENT

The issues reflected in this case have often been characterized as involving a "clash" of constitutional values. Our experience indicates that to so characterize the issues is to misconceive them. The "clash" between the values of free press and fair trial perceived by the courts below is not real; rarely, if ever, will there be a tension

between those two great protections sufficient to require one or the other to yield. Rather, we submit, this case can and should be resolved on the basis of three perfectly consistent propositions: (1) reporting about the functioning of the criminal justice system and the basic issues of crime and punishment is vital to our society and cannot be subjected to restraint in advance; (2) numerous remedies and mechanisms - not involving restraints on the press and not employed in this case - are available to assure the accused's right to a fair trial; and (3) any weakening of the ban on prior restraints, in the service of any supposedly competing interests, will inexorably lead to a relaxation of that vital safeguard whenever a countervailing interest is claimed to be served.

The orders of the Nebraska courts do not reach "an accommodation" between free press and fair trial, as the Nebraska Supreme Court suggested (AP 61a), but a sacrifice of one because of speculative effect on the other. For two reasons, such an accommodation is constitutionally unacceptable. First, since those orders directly restrained in advance the ability of the press to report on public court proceedings, documents and other aspects of the functioning of the criminal justice system in this particular case - including the existence of "information strongly implicative" of the accused - they are per se invalid under the First Amendment. Second, the restraints were imposed quickly and casually, with virtually no consideration of the availability of other remedies which would



safeguard the defendant's rights without infringing the petitioners', with no clear articulation of a standard by which such drastic restraints were supposedly justified, and with essentially no record whatsoever to support such extraordinary orders. The orders demonstrate the alarming ease with which the lower courts have adopted the prior restraint mechanism as a shotgun remedy for other problems, and if sustained, this Court's historic and repeated injunctions against prior restraints will become empty rhetoric.

I. THE FIRST AMENDMENT FORBIDS ANY DIRECT, PRIOR RESTRAINTS ON PRESS REPORTING OF PROCEEDINGS IN OPEN COURT, MATTERS IN PUBLIC COURT RECORDS, OR OTHER INFORMATION RELATING TO THE NATURE OF CRIMINAL PROCEEDING.

We deal here with the classic prior restraint - a judicial decree restraining in advance publication of certain categories of information and enforceable through the court's contempt powers.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 181 (1968). In order to overcome that

presumption the government "thus carries a heavy burden of showing justification for the imposition of such a restraint." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); New York Times, supra.

The presumption against prior restraints is heavier--and the degree of protection broader--than that against limits on expression imposed by criminal penalties.

Southeastern Promotions, Ltd. v. Conrad, \_\_\_ U.S. \_\_\_, 43 L.Ed. 2d 448, 459 (1975).

The element of likelihood required to justify a prior restraint on speech thus nears certainty:

...the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.

New York Times, supra, at 725-26 (Brennan, J., concurring).

Moreover, the substantive evil nearly certain to occur must be of such gravity that it has never been successfully demonstrated in this Court, which in dictum has accorded possible validity only to a prior restraint preventing injury that is a substantial threat to the



security of the nation:

...publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling a transport already at sea...

Id. at 726-27 (Brennan, J., concurring).

...I cannot say that [the Pentagon Papers] will surely result in direct, immediate, and irreparable damage to our Nation or its people.

Id. at 730 (Stewart, J., concurring).

See also Near v. Minnesota, 283 U.S. 697, 702 (1931) ("...publication of the sailing dates of transports or the number or location of troops..."). Thus, the only area where this Court has sanctioned, even theoretically, the imposition of a prior restraint on the publication of otherwise lawful information has involved possible threats to the very life of the Republic.

This Court has never suggested that vital reporting about the heart of the criminal justice process is any less immune from previous restraint. Quite the contrary. As long ago as in Craig v. Harney, 331 U.S. 367 (1947), the Court recognized the public nature of proceedings in open court and records concerning them:

A trial is a public event. What transpires in the courtroom is public property... Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Id. at 374.

Last year this Court re-emphasized the importance of that ruling in Cox Broadcasting Corp. v. Cohn, \_\_\_ U.S. \_\_\_, 43 L.Ed. 328 (1975), in which the reporting of the name of a rape victim, found in court records, was held protected by the First Amendment notwithstanding a Georgia statute prohibiting such publication. In Cox the Court recognized the critical role of the media in commenting on court proceedings, noting that most citizens view court proceedings through the press rather than personally (id. at 347), and, citing Craig v. Harney, supra, held that "States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection." Id. at 350. It is thus clear that those portions of the orders at issue here which prohibit the publication of information disclosed in court proceedings or records violate one of the central precepts of the First Amendment and cannot stand.

Nor can the rationale of the Cox case be

limited to the right to report information gleaned from public court proceedings and official records and documents open to the public. While such sources are "the basic data of governmental operations," 43 L.Ed. 2d at 347, they are not only data. Protection for the vital press functions which this Court identified in Cox cannot be made to vary depending on the source of the information reported. In either case, the press role remains the same:

With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. See Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). Cox Broadcasting Corp. v. Cohn, supra, 43 L.Ed.2d at 347.

Similarly, cases articulating standards for determining whether a subsequent conviction for contempt of court by publication would be justified cannot sustain the validity of prior restraints on reporting about the details of criminal prosecutions. Thus, although the Court has discussed the kind of showing which might justify subsequent punishment because of the impact which an out-of-court statement might have had on the administration of justice, those cases involved after-the-fact assessments of the measurable impact of such statements. Even in that context, this Court has consistently adhered to

the principle that considerations of fair trial do not justify the imposition of sanctions on otherwise protected speech absent a showing that the speech presents a "clear and present danger" to a fair judicial proceeding. Bridges v. California, 314 U.S. 252, 263 (1941); Pennekamp v. Florida, 328 U.S. 331, 348 (1946); Craig v. Harney, 331 U.S. 367, 373 (1947); Wood v. Georgia, 370 U.S. 375, 384 (1962). 2/ Thus, the test for the permissible subsequent punishment of speech in the name of a fair trial is a stringent one:

The fires which [the speech] kindles must constitute an imminent, not merely a likely, threat to the administration

2/ True, none of these cases involved protection of a petit jury, but individual justices and courts of appeal alike have since ruled that the same standards are applicable. Nebraska Press Ass'n. v. Stuart, 1975 CCH Sup.Ct. Bull.B 205, 217 (1975) (Blackmun, J., on Reapplication for Stay); Times-Picayune Publ. Corp. v. Schulinkamp, 42 L.Ed.2d 17 (1974) (Powell, j., on Application for Stay), appeal dismissed as moot, \_\_\_ U.S. \_\_\_, 43 L.Ed.2d 667 (1975); CBS, Inc. v. Young, 522 F.2d 234, 238 (6th Cir. 1975); Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1975); United States v. Dickinson, 465 F.2d 496, 507 (5th Cir. 1972); In re Oliver, 452 F.2d 111, 114 (7th Cir. 1971). Contra: United States v. Tijerina, 412 F.2d 661, 666 (10th Cir. 1969), cert. denied, 396 U.S. 990.



of justice. The danger must not be remote or even probable; it must immediately peril. Craig v. Harney, supra at 376.

In no such case has this Court ever found that the stringent test had been met. 3/

Therefore, since the standard even for subsequent punishment of speech because of its impact on the judicial process is such a stringent one and has in fact never been met in this Court, and given "the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system," New York Times Co. v.

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3/ The same standards for judging whether subsequent punishment should be imposed on speech concerning the judicial process have, with some variations, been employed to restrain the conduct of the participants in the judicial process. See, e.g., Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975). Amici are of the view that the imposition of sanctions against law enforcement and prosecution officials - the major sources of prejudicial publicity - is appropriate. But the issues of subsequent punishment and the issues of sanctions on official participants in the criminal justice process are quite different from the issue here - direct and prior restraints against the news media.

United States, supra, 403 U.S. at 730-31 (White, J., concurring), there can be no justification for any prior restraints on that most narrow category of speech about judicial proceedings which might arguably be subject to subsequent punishment. This is so because of the critical distinction between punishing speech after the fact and suppressing it in advance. As the Court just recently observed:

The presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. South-eastern Promotions, Ltd. v. Conrad, supra, 43 L.Ed.2d at 459.

In light of the presumption against prior restraints "deeply etched" in our law as a free society, and since no decisions of this Court exempt reporting about criminal matters from the ban against prior restraints, the



order below cannot stand. Nor, as we will show, do the interests of the criminal defendant require a contrary conclusion.

II. THE SOCIETAL INTERESTS IN ASSURING FAIR TRIALS TO CRIMINAL DEFENDANTS CAN BE ACHIEVED IN A VARIETY OF WAYS OTHER THAN IMPOSING PROHIBITED PRIOR RESTRAINTS ON THE PRESS.

The ruling below was premised on the assumption that without direct prior restraints on the press, the defendant's rights to a fair trial could not be assured. Even assuming the premise to be correct - and there is no showing in this record to support that assumption - that would still not justify the extraordinary mechanism of an injunction against publication. But given the variety of mechanisms that were available yet not employed, the rule against prior restraints, plus even the more normal doctrine that speech may not be infringed if any narrow, less intrusive alternatives will suffice to protect the governmental interests involved, see Grayned v. City of Rockford, 408 U.S. 104 (1972); Gooding v. Wilson, 405 U.S. 418 (1972), combine to render the orders below uniquely intolerable.

This Court's opinion in Sheppard v. Maxwell, 384 U.S. 333 (1966), recognized these principles because it rejected an invitation to examine the propriety of direct restraints on media publication, finding that several

available methods of limiting prejudicial publicity, not used by the trial judge, would have sufficed to protect the interests in a fair trial:

...the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press...

Id. at 358.

Sheppard invited courts to "take such steps by rule or regulation that will protect their processes from prejudicial outside interferences," identifying several such steps. Id. at 363. This suggestion was taken seriously by bench and bar; it produced at least three major studies of possible preventive measures, chief among which was the "Kaufman Report," officially known as the Report of the Committee of the Judicial Conference of the United States on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968). It reflects two years of study by the full Committee and its Subcommittee to Implement Sheppard v. Maxwell, and contains numerous specific suggestions for solution of the problem--among them regulation of public discussion by attorneys and all other courthouse personnel, control over the seating and conduct of spectators and

media personnel, a ban on television and radio in the courtroom, and more liberal use of traditional techniques such as continuance, change of venue, voir dire, sequestration of jurors and witnesses, and cautionary instructions.

In these respects the Kaufman Committee agreed with and relied heavily upon the report of the "Medina Committee," 4/ a blue-ribbon panel of the New York Bar which had recently studied the same issues, and the "Reardon Committee," 5/ a similar panel of the American Bar Association.

All three groups considered and rejected the approach used by the Nebraska courts here --direct restraint on media publication--in favor of the less intrusive procedural alternatives mentioned above. 6/

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4/ Freedom of the Press and Fair Trial: Final Report with Recommendations by the Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York (Columbia University Press, 1967).

5/ American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press (Tentative Draft, 1966).

6/ Kaufman Committee, 45 F.R.D. at 402-03; Reardon Committee, p. 69; Medina Committee, p. 45.

Two of the major curatives suggested by the bench and bar in the wake of Sheppard are now commonplace--restrictions on statements by prosecuting attorneys and courthouse and law enforcement personnel, and voluntary restraint by the media themselves. 7/ The wisdom of both these courses is endorsed by amici. The ACLU policy in this respect is attached to this brief as Appendix A.

Compared to direct prior restraints, restrictions on statements by prosecuting attorneys, court personnel, witnesses, and law enforcement officers are lesser intrusions and are subject to different constitutional considerations, including the roles of those persons as officers of the criminal justice process and the nature of the jurisdiction the trial court therefore retains over them. Sheppard, supra at 363. The limits imposed by the First Amendment on this category of restraints is not at issue here; it is enough for present purposes

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7/ The ACLU opposes restraints on the speech of a criminal defendant or his attorney. The former, who usually speaks through the latter, often faces community sentiment already marshalled against him, is before the court only by coercive process, is the party most interested in exposing claimed abuses of the prosecutorial power, and is, after all, the beneficiary of the Sixth Amendment's guarantee of an impartial jury. See Appendix A, pp. 5a-6a, infra.



to recognize the effectiveness of such restraints, soberly weighed, in reducing prejudicial publicity, particularly at the pretrial stage.

Voluntary restraint on the part of the media now makes obsolete the circuslike atmosphere found in Sheppard, supra, as the Nebraska Supreme Court recognized here.<sup>8/</sup> "In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast." Cox Broadcasting Corp. v. Cohn, supra at 350, citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

By far the most crucial tools in guaranteeing an impartial jury are found in the procedures governing its actual selection. Too often trial courts assume (as here) that careful voir dire will not serve for this purpose, without heeding the many techniques available in voir dire to ensure the selection of impartial jurors. See, e.g., Silverthorne v. United States, 400 F.2d 627, 635-40 (9th Cir. 1968), and cases cited.

Among the techniques available to increase the usefulness of voir dire in eliminating prejudiced jurors is examination of each

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<sup>8/</sup> "The press, in fact, appears to have followed the voluntary guidelines to which they apparently were parties." AP 62a.

prospective juror out of the presence of the others, to minimize the temptation to seem qualified. See Reardon Committee, *supra*, n. 5, Recommendation 3.4(a). A second suggestion of the American Bar Association involves statutory change where needed to permit selection of a jury from outside the area in which publicity has been most intense. *Id.* Recommendation 3.4(c). Even more important is allowing defense counsel to conduct voir dire himself--a technique much more likely, because of counsel's adversary role and greater knowledge of the case, to uncover potential prejudice. See Babcock, Voir Dire: Preserving its "Wonderful Power," 27 *Stanf.L. Rev.* 545, 548-49 (1975); *cf.* F.R.Crim.P. 24(a).

Greater attention to challenges for cause and peremptory challenges will also aid in ensuring impartial jurors. As this Court had recent occasion to say, in Groppi v. Wisconsin, 400 U.S. 505, 510 (1971):

Another way is to provide a method of jury qualification that will promote, through the exercise of challenges to the venire--peremptory and for cause--the exclusion of prospective jurors infected with the prejudice of the community from which they came.

The scope of the traditional challenge for cause is subject to the overriding constitutional requirement of an impartial jury and must yield to what this Court has called "the presumption of partiality," Reynolds v. United States, 98 U.S. 145, 156 (1878), a presumption that arises whenever publicity has been so great as to make likely the existence of pre-



judice in large segments of the community.  
Irvin v. Dowd, 366 U.S. 717, 727 (1961).

Peremptory challenges are always limited in number (see, e.g., F.R.Crim.P. 24(b)) and have nearly always been exhausted in the relevant cases that have reached this Court. See, e.g., Rideau v. Louisiana, 373 U.S. 723, 725 (1963); Beck v. Washington, 369 U.S. 541, 558 (1962). But voir dire is in American law the accepted predicate for the exercise of peremptory challenges, which exist "to eliminate extremes of partiality" and which are "a necessary part of trial by jury." Swain v. Alabama, 380 U.S. 202, 219 (1964). Otherwise valid procedural limitations imposed on the number of peremptory challenges must, therefore, in a proper case, yield to the constitutional necessity of an impartial jury. Gropi v. Wisconsin, supra.

There are so many alternative methods to ensure impartial jurors short of direct restraints on free speech that a case in which the rights of free speech and fair trial are actually in conflict may never reach this Court. Certainly Sheppard v. Maxwell, supra, in which this Court held that such alternatives "would have been sufficient to guarantee" a fair trial, 384 U.S. at 358, is not such a case. Certainly this case, in which prior restraints were imposed far in advance of trial on nothing more than speculation, is not such a case.

Amici believe that the careful and proper use of all available measures short of prior

restraints will suffice to guarantee a fair trial in nearly every sensational case. In those very few cases to the contrary, such remedies as change of venue at the defendant's request--see, e.g., Gropi v. Wisconsin, supra; Rideau v. Louisiana, supra; Sheppard v. Maxwell, supra--and continuance at the defendant's request while publicity abates (cf. Ehrlichman v. Sirica, 42 L.Ed.2d 25 (1974) (Burger, C.J., as Circuit Justice), will usually be available. It is not inconceivable that a unique case in which all alternatives are exhausted may require reversal, or, to preserve the right to speedy trial, even dismissal. But it is inconceivable that this very remote possibility could serve as the justification for the kind of direct restraints on news reporting permitted by the courts below.

CONCLUSION

For the foregoing reasons, amici respectfully urge that the orders of the Nebraska courts be reversed.

Respectfully submitted,

CHARLES C. MARSON  
JOSEPH REMCHO  
American Civil Liberties  
Union Foundation of  
Northern California, Inc.  
814 Mission St., 3d Floor  
San Francisco, CA 94103  
Tel: [415] 777-4880

BRENT A. BARNHART  
American Civil Liberties  
Union of Northern  
California, Inc.  
1220 "H" Street, #103  
Sacramento, CA 95814  
Tel: [916] 442-1036

MELVIN L. WULF  
JOEL M. GORA  
American Civil Liberties  
Union Foundation  
22 East 40th Street  
New York, NY 10016  
Tel: [212] 725-1222

DENNIS R. KEEFE  
c/o Nebraska Civil Liberties  
Union  
1030 Q Street  
Lincoln, NE 68501  
Tel: [402] 432-8091

# APPENDIX

American Civil Liberties Union  
Policy Statement

POLICY #212

Prejudicial Pre-Trial Publicity

One of the most difficult problems the Union has been called upon to resolve is that raised by the publicizing of pending criminal trials. On the one hand, the Union has steadfastly held as its core principle the inviolability of First Amendment freedoms, including freedom of the newspapers and electronic media to report all matters that they hold to be newsworthy. On the other hand, it has consistently urged even more rigorous standards of due process in criminal proceedings, including methods of ensuring impartial judges and juries.

Any attempt to suggest proper guidelines in this area doubtlessly will offend what many regard as a virtually absolute right to report events that qualify as news. Yet it is equally certain that the release or reporting of information relating to a criminal prosecution can, in a significant number of instances, effectively destroy the right of an individual to a fair trial. For, in a widely publicized case, that defendant often must either take his chances with a jury whose members he knows have been exposed on numerous occasions to the press' version of the crime, or forego the constitutional right and protection of a jury trial, trusting to the supposedly greater objectivity of a judge.



The general recognition of the need to assure a fair trial has resulted in the adoption, by the American Bar Association and other professional, legal and journalistic organizations, of new standards for this area.

The ACLU concurs in many of these new standards aimed at preserving the historic right to a fair trial without unduly limiting public discussion and public understanding of the machinery of justice.

Regarding specific standards, the ACLU recommends that all officials involved in the enforcement of law and prosecution of criminal defendants under the local, state, and federal laws abide by the following guidelines which apply to the release of information to news media from the time of a prosecutor's focus on the particular defendant until the proceeding has been terminated by trial or otherwise:

- 1) No statement of information should be released for the purpose of influencing the outcome of a trial.
- 2) Subject to specific limitations imposed by law or court order, officials may make public the following:
  - (a) Defendant's name, age, residence and similar background other than race, religion, employment, and marital status;
  - (b) Substance or text of charge;
  - (c) Identity of investigating and arresting agency and length of investigation.

- (d) Time and place of arrest.
- (e) But none of the above information should be disclosed where such disclosure would be prejudicial comment on the case or circumstances of arrest.
- 3) No information should be released concerning the criminal or arrest record or confession of a person accused of crime.
- 4) No information should be released by officials concerning:
  - (a) Observations about a defendant's character.
  - (b) Statements, admissions, confessions, or alibis attributable to a defendant.
  - (c) References to investigative procedures (fingerprints, polygraph tests, etc.)
  - (d) Statements concerning identity, credibility, or testimony of prospective witnesses.
  - (e) Statements concerning evidence or argument in the case.
  - (f) Circumstances surrounding arrest (residence, use of weapons, etc.)
- 5) Officials in charge of custody of a defendant must protect him from being photographed or televised while in custody. No photographs of defendant should be released unless they serve a proper investigative function.

- 6) None of these restrictions are intended to apply to release of information concerning a person accused of crime when such release is deemed necessary to apprehend him.

The most troublesome issue has been the question of how best to enforce these informational standards in order to ensure the defendant's right to a fair trial. The Union has taken note of the cooperation between the bar and the press which has resulted in the formulation of voluntary press guidelines. Such voluntary press codes have apparently been adopted in almost half of the states. They are premised on the theory of self-regulation by the press and ultimately rely on the discretion of news editors.

The main difficulty is whether the voluntary compliance approach is effective in preserving the defendant's right to a fair trial. Until it is shown that the voluntary approach is effective in safeguarding the defendant's right to a fair trial, we favor the direct application of sanctions against the public officials who release prejudicial information. If, in addition to these restrictions, news media want to refrain voluntarily from publishing any prejudicial information they do obtain, the ACLU would of course support such self-restraint. But we cannot support voluntary codes in lieu of sanctions against law enforcement officials.

Regarding the use of sanctions, the ACLU favors directing sanctions against law en-

forcement officers and prosecuting attorneys responsible for presenting a case to the press instead of to the court. One simple method of control is the adoption of specific administrative measures and policy statements by police departments and prosecuting attorneys' officers to guide the conduct of employees. Improper release of information would thereby be grounds for disciplinary action.

In addition, a procedure should be adopted by rule or statute in all courts, allowing judges to admonish publicly law enforcement officers and prosecution attorneys responsible for aiding or creating prejudicial publicity. The court could also refer the matter to the appropriate bar association committee on ethics. Aside from the advantages of its deterrent effect, the proposal would enable a judge to act immediately after the release of prejudicial publicity, rather than wait, as is now done, until the trial to exercise his limited power of instructing a jury to disregard newspaper comment - when it is generally too late to dissipate the effects of prejudicial reporting.

The ACLU believes that a defense attorney in criminal proceedings should not be subject to judicial sanction for pre-trial statements to the press concerning his client or the circumstances to which the pending litigation relates. There are several reasons for treating defense counsel in criminal prosecutions differently from prosecution attorneys:

- 1) Public prosecutors are apt not to



prosecute cases that are against the general public sentiment, while defense counsel often have the burden of representing an interest or person that is disfavored by the majority of the community;

- 2) There is a generally held presumption that the prosecutor has acted in the public interest in proceeding against the defendant, and therefore statements by the prosecutor are more readily believed. On the other hand, there is no such presumption that the defense counsel is acting in the public interest; his remarks will be received by the public with the thought that they are made on behalf of his client whom "the people," through the prosecutor, have charged with a crime;
- 3) Defense counsel often faces a community sentiment already well-marshalled against the defense.
- 4) The concept of "fair trial" in the present context is essentially to guarantee the accused individual a trial by a jury that is free of prejudice. Absent this premise there would be little reason for adding judicial sanctions to enforce the nearly universally accepted professional self-restraint counsel have traditionally imposed on themselves to assure that the judicial process is a fair one.

The present narrow scope of the traditional challenge for cause should be expanded to permit challenge of any juror who has gained a substantial degree of knowledge about a case from pre-trial publicity, whether or not the juror thinks he is impartial. This method would also be a further discouragement to police and prosecuting attorneys who might instigate prejudicial publicity in the hope of making convictions easier to obtain, because it would disqualify many prospective jurors and thus delay trial. When pre-trial publicity, despite all precautions, reaches virtually all members of a community, a change of venue is usually possible. In appropriate cases where extensive pre-trial publicity, prejudicial to the defendant, has emanated from the government, the defendant shall be entitled to a dismissal of the charges. In any event, difficulty in securing an impartial jury is a reasonable price to pay for ensuring that the right to a fair trial will not be destroyed by intentional efforts to sway the community through publicity.

The Union feels that at the present time it would be a mistake to enact sanctions directly against the press. Unless experience under the new rules regulating conduct of officials who are more intimately a part of the judicial process shows them to be inadequate, the press should not be subjected to controls that may well violate fundamental constitutional rights.

The ACLU suggests that the Judicial Conference of the United States explore the



problem of the potential bias that inflammatory publicity may create in judges, with a view to adopting standards governing the conduct of judges in sensational, well-publicized cases. [Board Minutes, February 6-7, 1971; Press release, April 22, 1971.]

JAN 15 1976

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION; OMAHA WORLD-  
HERALD COMPANY; THE JOURNAL-STAR PRINTING  
CO.; WESTERN PUBLISHING CO.; NORTH PLATTE  
BROADCASTING CO.; NEBRASKA BROADCASTERS  
ASSOCIATION; ASSOCIATED PRESS; UNITED PRESS  
INTERNATIONAL; NEBRASKA PROFESSIONAL CHAP-  
TER OF THE SOCIETY OF PROFESSIONAL JOURNAL-  
ISTS/SIGMA DELTA CHI; KILEY ARMSTRONG; ED-  
WARD C. NICHOLLS; JAMES HUTTENMAIER; WIL-  
LIAM EDDY;

*Petitioners,*

v.

THE HONORABLE HUGH STUART, JUDGE,  
DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF NEBRASKA

BRIEF OF NATIONAL BROADCASTING COMPANY, THE  
NEW YORK TIMES COMPANY, PHILADELPHIA NEWSPA-  
PERS, INC., CHICAGO SUN-TIMES, CHICAGO DAILY NEWS,  
DOW JONES & COMPANY, INC., THE READER'S DIGEST  
ASSOCIATION, INC., PUBLIC BROADCASTING SERVICE,  
CBS INC., PARADE PUBLICATIONS, INC., HARTE-HANKS  
NEWSPAPERS, INC., AMERICAN SOCIETY OF NEWSPAPER  
EDITORS, THE SOCIETY OF PROFESSIONAL JOURNAL-  
ISTS, SIGMA DELTA CHI, ASSOCIATED PRESS MANAGING  
EDITORS ASSOCIATION, NATIONAL ASSOCIATION OF  
BROADCASTERS, RADIO TELEVISION NEWS DIRECTORS  
ASSOCIATION AND NATIONAL NEWSPAPER ASSOCIATION  
AS *AMICI CURIAE*

FLOYD ABRAMS  
EUGENE R. SCHEIMAN  
KENNETH M. VITTOR  
CAHILL GORDON & REINDEL  
80 Pine Street  
New York, N.Y. 10005  
*Attorneys for Amici Curiae*

Of Counsel:

CORYDON B. DUNHAM  
Vice President and General Counsel  
National Broadcasting Company, Inc.  
30 Rockefeller Plaza  
New York, N.Y. 10020  
*Attorney for National Broadcasting  
Company, Inc.*

DAVID H. MARION  
HAROLD E. KOHN, P.A.  
1214 IVB Building  
1700 Market Street  
Philadelphia, Pa. 19103  
*Attorneys for Philadelphia Newspapers,  
Inc. and Parade Publications, Inc.*

ROBERT SACK  
PATTERSON, BELKNAP & WEBB  
30 Rockefeller Plaza  
New York, New York 10020  
*Attorneys for Dow Jones & Company,  
Inc.*

NORMAN SINEL  
General Counsel  
Public Broadcasting Service  
West Building  
L'Enfant Plaza  
Washington, D.C. 20024  
*Attorney for Public Broadcasting  
Service*

DONALD CREWS  
JACKSON, WALKER, WINSTEAD, CANTWELL  
& MILLER  
4300 First National Bank Building,  
Dallas, Texas 75202  
*Attorneys for Harte-Hanks Newspapers,  
Inc.*

JOHN B. SUMMERS  
General Counsel  
National Association of Broadcasters  
1771 N Street, N.W.  
Washington, D.C. 20036  
*Attorney for National Association of  
Broadcasters*

WILLIAM MULLIN  
General Counsel  
National Newspaper Association  
491 National Press Building  
Washington, D.C. 20045  
*Attorney for National Newspaper  
Association*

JAMES C. GOODALE  
Executive Vice President and  
Counsel  
The New York Times Company  
229 W. 43rd Street  
New York, N.Y. 10036  
*Attorney for The New York Times  
Company*

DANIEL FELDMAN  
ISHAM, LINCOLN & BEALE  
One First National Plaza  
Chicago, Illinois 60670  
*Attorneys for Chicago Sun-Times and  
Chicago Daily News*

WILLIAM BARNABAS MCHENRY  
DAVID OTIS FULLER, JR.  
The Reader's Digest Association  
200 Park Avenue  
New York, New York  
*Attorneys for The Reader's Digest  
Association, Inc.*

ELEANOR APPLEWHAITE  
General Attorney  
CBS Inc.  
51 West 52nd Street  
New York, N.Y. 10019  
*Attorney for CBS Inc.*

RICHARD M. SCHMIDT, JR.  
IAN VOLNER  
COHN AND MARKS  
1920 L Street, N.W.  
Washington, D.C. 20036  
*Attorneys for American Society of  
Newspaper Editors, The Society of  
Professional Journalists, Sigma Delta  
Chi and Associated Press Managing  
Editors Association*

J. LAURENT SCHARFF  
PIERSON, BALL & DOWD  
1000 Ring Building  
1200 18th Street, N.W.  
Washington, D.C. 20036  
*Attorneys for Radio Television News  
Directors Association*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1975

No. 75-817

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ASSOCIATION AND NATIONAL NEWSPAPER ASSOCIATION  
AS AMICI CURIAE



### Opinions Below

The opinions of the County Court of Lincoln County, Nebraska, dated October 22, 1975, and the District Court of Lincoln County, Nebraska, dated October 27, 1975, are set forth at p. 1a and 9a.\* The *per curiam* statement of the Nebraska Supreme Court issued on November 10, 1975 is set forth at p. 19a. The opinion of Mr. Justice Blackmun, dated November 13, 1975 is set forth at p. 21a. The Order of the Nebraska Supreme Court for Hearing and Order to Show Cause entered on November 18, 1975 is set forth at p. 29a. The opinion of Mr. Justice Blackmun dated November 20, 1975 is set forth at p. 35a. The majority and dissenting opinions of the Nebraska Supreme Court dated December 1, 1975 are set forth at p. 44a and are reported at 63 Neb. S.C.J. 783, — N.W.2d —. The Orders of this Court, dated December 8, 1975 and December 12, 1975, *inter alia*, granting the motion for petitioners to treat papers previously filed by them with this Court as a Petition for a Writ of Certiorari to the Supreme Court of Nebraska and granting said Petition are set forth at p. 70a and p. 71a. Except as indicated above, none of said opinions is thus far reported.

### Jurisdiction

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1970).

\* All references to prior opinions in this brief are to the appropriate pages of the Appendix to the amended petition for certiorari.

### Consent of the Parties

All the parties to this litigation, by their attorneys, have consented to the filing of this brief. Their consents are on file with the Clerk of this Court.

### Question Presented

Whether, consistently with the First and Fourteenth Amendments, the press may be enjoined from publishing news with respect to pending criminal judicial proceedings.

### Constitutional Provisions Involved

The First Amendment to the United States Constitution provides in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

### Statement

The facts and previous decisions in this case are detailed in the briefs of the parties and we restrict ourselves to a summary statement.

On or about October 18, 1975, six members of the Kellie family were allegedly murdered in their home at Sutherland, Nebraska, and one or more of the alleged murders were purportedly in connection with the perpetration of or attempt to perpetrate one or more sexual assaults.

On October 19, 1975, defendant Erwin Charles Simants was arrested by the Lincoln County Sheriff and later charged with six counts of murder in the first degree in the perpetration or attempted perpetration of one or more sexual assaults. At the arraignment hearing held before the County Court, several journalists were in attendance. Although a portion of the hearing was conducted openly, a part of the hearing was closed by the court to the press and the public.

The preliminary hearing was scheduled in the County Court of Lincoln County, Nebraska, at 9:00 A.M. on October 22 for a determination as to whether Simants should be bound over to the District Court of Lincoln County, Nebraska, on the charges set forth in the amended complaint. On October 21, the prosecution filed a motion with the County Court requesting that a restrictive order be entered by that court. The defense joined in the prosecution's request and also moved that the preliminary hearing be closed to the public and the press. The latter request was denied by the County Court and an open preliminary hearing was held on October 22 at which time testimony was taken from various witnesses.

One witness at the preliminary hearing was Dr. Miles Foster, a pathologist, who testified, *inter alia*, that all of the victims had been shot in the head and that he found evidence of sexual assault on one of the victims, a 10 year old girl.

Another witness was James Robert Boggs, a 13 year old nephew of the defendant, who testified as follows\*:

"... on Saturday night, October 18, 1975, defendant got a .22 caliber automatic rifle from the bedroom of James Robert Boggs' parents. That it was his impression that the defendant loaded said gun. That the defendant then told James Robert Boggs to keep the kids inside and don't tell anyone anything. That the defendant left the home for a period of approximately 10-15 minutes. That the defendant then returned to the home and set the rifle down in the kitchen. The defendant then sat down at a table and wrote something on a piece of paper. The defendant then went downstairs with the piece of paper. That the defendant then cleaned the rifle and put it back in the bedroom of his parents. That the defendant then told James Robert Boggs 'I shot the Kellies. I did not want to shoot David and them, but he came in.' Then the defendant told James Robert Boggs to call his grandma (Grace Simants), which he did. He then gave the phone to the defendant but did not hear the telephone conversation. James Robert Boggs then testified that the defendant

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\* The following quotations are from the affidavit of Kiley Armstrong, a journalist employed by the Associated Press, who attended the preliminary hearing. The affidavit was submitted to the Nebraska courts, is before this Court, and has not been disputed in any detail whatever by any of the parties to this litigation. (As of the filing of this brief, the Appendix has not been filed by the petitioners and no page citations thereto with respect to Ms. Armstrong's affidavit are consequently set forth herein.)

left the home and told him not to tell anyone. That later, James Robert Boggs' parents found a written note downstairs on a fan. James Robert Boggs then testified as to what his parents told him was on the note and that he stated that it said 'Don't cry. It was the only way.'

Another witness at the preliminary hearing was Amos Simants, father of the defendant, who testified as follows:

"... his wife received a phone call from the defendant, that at about 9:00 P.M. the defendant came to their home, that the defendant told him 'I beat the Kellies to death.' That Amos Simants then testified that he did not believe the defendant so he went to the Kellie's home to see for himself. That at the Kellie's home he saw two bodies on the floor and that there was blood on each of them and that he then called for an ambulance."

A Nebraska State Patrol Investigator named Terry Livengood testified at the preliminary hearing that:

"... he went to the Boggs' home and took possession of a .22 caliber automatic rifle and note reading 'I am sorry. Do not cry. It was the only way.'"

Testimony was also given at the preliminary hearing by Lincoln County Sheriff Gordon D. Gilster that he:

"went to the Boggs' home, arrested the defendant at approximately 8:00 a.m. on Sunday morning, October 19, 1975, and took him into custody. He took the defendant to the jail and took a statement from the defendant. That he later took a second statement from the defendant and recorded it."

After the entry by the County Court on October 22 of an Order finding that "there is a reasonable likelihood of prejudicial news [coverage] which would make difficult, if not impossible, the impaneling of an impartial jury", the "news media" was enjoined from disseminating "any information" concerning the case "other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation." (1a, 2a).

On October 27, the District Court terminated the County Court's order and substituted its own. The District Court found "because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." The District Court adopted the aforementioned Nebraska Bar-Press Guidelines as "clarified" by the court in its order. The District Court ordered as follows:

1. It is hereby stated the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing, is "pre-trial" publicity.
2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it.
3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these wit-



nesses with reference to such statements in the preliminary hearing will not be reported.

4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at careful discretion of the press. The testimony of this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.

5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported.

6. The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported." (10a-11a).

On October 31, petitioners sought relief from the District Court's order after having abided by the various orders of both the County and District Courts for nine days. Petitioners sought a stay from the District Court of its order and on the same day sought from the Supreme Court of Nebraska immediate relief, by way of mandamus, stay, and/or expedited appeal, from the District Court's order. Upon the failure of both the District Court and the Supreme Court of Nebraska to act on the requested relief, the petitioners filed an application on November 5 with this

Court (directed to Mr. Justice Blackmun, as Circuit Justice) which sought to stay the District Court's order.

On November 10, the Supreme Court of Nebraska issued a *per curiam* statement in which that court declined to take any action on the petitioners' writ of mandamus action pending before it until such time as this Court made known whether it would accept jurisdiction in the matter. (19a).

On November 13, Mr. Justice Blackmun, acting in his capacity as Circuit Justice, issued a chambers opinion in which he declined to act finally on the petitioner's application for stay of the District Court's order "[o]n the expectation, which I think is now clear and appropriate for me to have, that the Supreme Court of Nebraska, forthwith and without delay, will entertain the petitioners' application made to it, and will promptly decide it in the full consciousness that time is of the essence." (21a, 28a).

On November 18, the Nebraska Supreme Court set November 25 as the date on which it would hear petitioners' arguments on their request for mandamus and on the substantive questions surrounding the validity under the Constitution of the District Courts' order. The petitioners, pursuant to the November 13 ruling of Mr. Justice Blackmun, on November 18 renewed their application for a stay.

On November 20, Mr. Justice Blackmun granted petitioners a partial stay of the District Court's order after concluding that the Supreme Court of Nebraska's delay in rendering a definitive decision had exceeded "tolerable limits". (35a, 36a). Those portions of the outstanding prior restraints which Mr. Justice Blackmun declined to stay "at least on an application for a stay and at this distance" related to "certain facts that strongly implicate an accused" if "publicizing [those] facts will irreparably impair the

ability of those exposed to them to reach an independent and impartial judgment as to guilt." (40a, 41a).

On November 21, petitioners filed a motion with all Justices of this Court to vacate so much of Mr. Justice Blackmun's order dated November 20 as had not stayed the imposition upon the press of the prior restraint on publication.

On November 25, the Supreme Court of Nebraska heard oral argument upon the petitioners' request for a stay of the District Court's order. On December 1 the Nebraska Supreme Court issued a *per curiam* opinion (two judges dissenting on jurisdictional grounds and two others joining the remaining three solely to break what would otherwise have been a procedural deadlock). (44a). The Court held as follows:

"We conclude that the order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon freedom of the press. The guidelines were not intended to be contractual and cannot be enforced as if they were.

"The order of the District Court of October 27, 1975, is vacated and is modified and reinstated in the following respects: It shall be effective only as to events which have occurred prior to the release of this opinion, and only as it applies to the relators herein, and only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interests made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to repre-

sentatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings." (64a).

On December 4, petitioners applied to this Court for a stay of the order of the Supreme Court of Nebraska and further moved this Court to treat the previously filed papers as a Petition for a Writ of Certiorari. On December 8, this Court denied without prejudice the petitioners' motion dated November 21 which sought to vacate in part Mr. Justice Blackmun's stay order dated November 20 insofar as that order expired on December 1, the date of the Supreme Court of Nebraska's order. This Court granted petitioners' motion to treat the previously filed papers as a Petition for a Writ of Certiorari, consideration of which was deferred until additional papers were received by this Court or until the close of business on December 9; consideration was also deferred of the application for a stay of the order of the Supreme Court of Nebraska. (Justices Brennan, Stewart and Marshall would have granted the latter application.) (70a).

On December 12, 1975, this Court granted the Petition for a Writ of Certiorari; denied the motion to expedite (Justices Brennan, Stewart and Marshall dissenting); denied the application for a stay (Justices Brennan, Stewart and Marshall dissenting in whole; Justice White dissenting with respect to the publication of information disclosed in public at the preliminary hearing in the Simants case); and invited the submission of an Amended Petition for Certiorari, which was filed with the Court on December 24, 1975. (71a).

The jury in the Simants case was empaneled on January 8, 1976.



### Interest of the *Amici*

The *amici* are publishers, broadcasters, journalists and associations thereof. National Broadcasting Company, Inc. operates television and radio networks and owns and operates television and radio stations. The New York Times Company publishes, *inter alia*, *The New York Times* and 13 newspapers in Florida and North Carolina. Philadelphia Newspapers, Inc. publishes *The Philadelphia Inquirer* and *The Philadelphia Daily News*. *The Chicago Sun-Times* and *The Chicago Daily News* are published by Field Enterprises, Inc. Dow Jones & Company publishes, *inter alia*, *The Wall Street Journal*, *Barron's National Business and Financial Weekly*, and *The National Observer*. The Reader's Digest Association, Inc. publishes *Reader's Digest* and is engaged in a number of other publishing activities. The Public Broadcasting Service is a non-profit membership corporation which manages the distribution of national public television programs to its 264 member stations. CBS Inc. operates television and radio networks and owns and operates television stations. Parade Publications, Inc. publishes *Parade Magazine*, a Sunday supplement distributed in 111 newspapers. Harte-Hanks Newspapers, Inc. publishes 47 daily and weekly newspapers in 9 states and owns and operates 2 television stations.

The American Society of Newspaper Editors is a nationwide professional organization of more than 750 persons holding positions as directing editors of daily newspapers throughout the United States. The Society of Professional Journalists, Sigma Delta Chi is the society of students and practitioners of journalism, with over 250 professional and student chapters and nearly 27,000 members. The Associated Press Managing Editors' Association is an association of the managing editors of newspapers throughout the

United States, large and small, which are members of the Associated Press. The National Association of Broadcasters is an association of radio and television broadcasters with a membership of 2479 AM radio stations, 1710 FM radio stations, five radio networks, 539 television stations and all commercial television networks. Radio Television News Directors Association includes approximately 1100 members who are active in the supervision, gathering, reporting and editing of news and other information of public affairs broadcast throughout the nation. National Newspaper Association is composed of approximately 6400 members each of which publishes either a daily or weekly newspaper.

A number of the *amici* have themselves been the subject of unsuccessful efforts to impose prior restraints upon the press. *E.g.*, *United States v. Schiavo*, 504 F.2d 1 (3d Cir. 1974) (*en banc*), *cert. denied*, 419 U.S. 1096 (1975); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Community Hearing Aid Service, Inc. v. National Broadcasting Company*, Civ. No. C-75-117 (N.D. Ohio, 1975). *Cf. Oliver v. Postel*, 30 N.Y.2d 171, 331 N.Y.S.2d 407, 282 N.E.2d 306 (1972). All the *amici* believe that the protection of the press against prior restraints remains at the core of the First Amendment. It is that protection, more than any other, which insures both the independence and the freedom of the press. And it is that long-established and much reiterated protection which is now once again challenged—in this case by a decision of the Nebraska Supreme Court which actually asserts that the imposition of a prior restraint on the press is an “accommodation” of First and Sixth Amendment interests. (44a). The *amici* believe that the prior restraint imposed in this case threatens not only the ability of the press freely to report about criminal pro-



ceedings, but also their ability to report about all other matters. For that reason, the *amici* submit this brief to urge this Court to declare in unequivocal terms that prior restraints such as have been imposed in Nebraska are constitutionally prohibited.

### Summary of Argument

What has so often been referred to as the "conflict" between free press and fair trial or—depending on the speaker—fair trial and free press is now squarely before this Court. It has served more than once as a topic for high school and college public speaking contests; it may well be a subject as to which more law review commentary has been devoted than any other\*; and it is undoubtedly a subject as to which as much controversy exists and within the legal community as any other.

But real as the general controversy has been, it has rarely raged with respect to the specific and narrow issue before this Court: shall *prior restraints* be permitted against the press barring its publication of materials with respect to pending court proceedings? The negative response to that issue has generally been a given, a starting point for further discussion, or—at the very least—a conclusion reached before proceeding to other more difficult issues.

Thus, as a matter of precedent, this case is hardly a close one. The authorities of this Court, the virtually unanimous reported decisions of both state and federal courts, and a variety of reports of bar association and judicial committees have all repeatedly concluded that no

\* See T. Emerson, *THE SYSTEM OF FREEDOM OF EXPRESSION* 459 (1970).

direct prior restraints are permissible on the press with respect to its news reporting about judicial proceedings.

Nonetheless, the prior restraint against publication in this case is not the first to issue in recent years. The *amici* believe that this is due, in good part, to three misconceptions with respect to prior decisions of this Court, misconceptions the *amici* urge this Court to deal with in its opinion in this case.

The first of these relates to the repeated articulation by this Court of the proposition that every prior restraint bears a "heavy presumption of invalidity"—a statement which led the Nebraska Supreme Court erroneously to conclude that this "presumption", like any other, might be overcome on an appropriate *ad hoc* showing of alleged need. The second of these relates to the nature of this Court's seminal decision in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), a decision the Nebraska Supreme Court erroneously construed to permit the imposition of direct prior restraints upon the press. The third relates to dictum of this Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which was, the *amici* believe, also erroneously construed by the Nebraska Supreme Court to permit the issuance of the prior restraint here at issue.

### ARGUMENT

So consistent are the authorities to the effect that, in Professor Bickel's words, "[p]rior restraints fall on speech with a brutality and a finality all their own" and that "it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech" \* that prior restraints with respect to news reporting about judicial proceedings have almost invariably

\* A.M. Bickel, *THE MORALITY OF CONSENT* 61 (1975).

been viewed as absolutely forbidden. This has generally been the case regardless of whose view was being articulated and what view he took of other issues such as the use of the contempt power against the press, such limitations as may be placed on the right of court personnel, attorneys and others to speak with the press, and the like.

Thus, in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), this Court, in the course of an opinion specifying a wide variety of actions open to a trial court to protect the right of a defendant to a fair trial, was explicit as to one type of judicial action which could not be employed: the placing of "any direct limitations on the freedom traditionally exercised by the news media. . . ." (384 U.S. at 350). Following *Sheppard*, four separate reports of judges and bar associations have considered the general subject of "free press—fair trial." In some respects they differed; but as to the illegality and lack of wisdom of *any* prior restraints on the press in its publication of materials with respect to pending judicial proceedings, they were in total agreement.

The first of the reports was that of the American Bar Association's Advisory Committee on Fair Trial and Free Press (1968), the Chairman of which was Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court. The Reardon Report was and is extremely controversial—particularly with respect to sections (which many in the press and elsewhere believe are unconstitutional) recommending the use of the contempt power in certain circumstances against the press.\* But the Reardon Report was

\* The contempt power set forth in section 4.1 of the Approved Draft, was, to the extent here relevant, to be used:

- "(a) Against a person who, knowing that a criminal trial is in progress or that jury is being selected for such a trial:
  - (i) disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public

clear in disavowing any "direct restrictions on the media." (*Id.* at 151).

Following the Reardon Report, a committee of The Association of the Bar of the City of New York chaired by Judge Harold R. Medina studied the subject and recommended, in its report on *Freedom of the Press and Fair Trial*, against any expanded use of the contempt power because it believed "that as a matter of both constitutional law and policy" any such expansion was "neither feasible nor wise. . . ." (*Id.* at 10-11). With respect to the rejection of the imposition of any prior restraints on press coverage of judicial proceedings contained in the Reardon Report, the Medina Report was in full agreement.

The next report was that submitted to the Judicial Conference of the United States by the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" issue, the chairman of which was Judge Irving Kaufman. 45 F.R.D. 391 (1968). That report concluded that "any direct curb or restraint on publication by the press of potentially prejudicial material . . . is both unwise as a matter of policy and poses serious constitutional problems" and could not be recommended.

The most recent Bar Association report is in complete accord with the three earlier reports. The revised draft of "Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press" was issued by the ABA Advisory Committee on Fair Trial and Free Press in November 1975. That draft is also controversial. By proposing the adoption of certain specified procedures prior

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record of the court in the case, that is wilfully designed by that person to affect the outcome of the trial." ABA Advisory Committee on Fair Trial and Free Press, Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press 13-14 (approved draft, March 1968).



to the entry of any restrictive orders, it has led many in the press (including some of the *amici* submitting this brief) to express concern that the existence of such procedures could tend to encourage the imposition of restrictive orders and legitimize those that are issued. Whatever the merits of that proposal, it is—like the reports before it—unequivocal in its rejection of the imposition of any direct restraints upon the media. As phrased by the Committee:

“First by recommending the procedure for adoption of Standing Guidelines and Special Orders, the Committee wishes to stress that it does not intend to recommend or encourage the use of judicial restrictive orders. Further, given the apparent ever-increasing tension between the courts and the press in executing their respective functions, and the significant constitutional problems which may be raised by the issuance of certain restrictive orders, *the Committee specifically recommends against the issuance of any orders which would impose direct restraints on the press.* It is clear that the free flow of information concerning court business is important and necessary not only to the requirements of a free press and a fair and public trial, but the greater public understanding of the judicial function and the rule of law in our society.” (Emphasis added)

See also, Roney, *The Bar Answers the Challenge*, 62 A.B.A.J. 64 (1976).

The conclusion of each of these reports that prior restraints cannot and should not issue against publication of news about judicial proceedings was consistent with virtually every reported decision in the area. The first two reported cases in this area both arose in California. In

both *In re Shortridge*, 99 Cal. 526, 34 P. 227 (1893), and *Dailey v. Superior Court*, 112 Cal. 94, 44 P. 458 (1896) prior restraints were sought and denied—in the first case against the publication of public court testimony and in the second against the performance of a play about a pending murder case. Since those rulings, the reported judicial decisions have held unconstitutional or otherwise void a wide variety of limits sought to be imposed on press coverage of the courts. See *Ex Parte Foster*, 44 Tex. Cr.R. 423, 71 S.W. 593 (1903) [order held illegal barring publication of public court testimony]; *Ex Parte McCormick*, 129 Tex. Cr.R. 457, 88 S.W.2d 104 (1935) [order held illegal barring publication of testimony introduced in open court]; *State v. Morrow*, 57 Ohio App. 30, 11 N.E.2d 273 (Summit Co. 1937) [order held illegal barring publication of names of grand jurors]; *Ithaca Journal News, Inc. v. City Court*, 58 Misc.2d 73, 294 N.Y.S.2d 558 (Sup.Ct. Tompkins Co. 1968) [order held illegal barring publication of names of youthful offenders]; *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966) [order held illegal barring publication of information introduced at habeas corpus hearing]; *Johnson v. Simpson*, 433 S.W.2d 644 (Ky. 1968) [order held illegal barring publication of names of witnesses who were juveniles]; *State v. Sperry*, 79 Wash.2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971) [order held illegal barring publication of information relating to proceedings at trial unless they occurred in the presence of a judge and jury]; *State ex rel. Miami Herald Publishing Co. v. Rose*, 271 So. 2d 483 (Fla. Ct.App. 2d Dist. 1972) [order held illegal barring publication of information about murder case except testimony presented in open court]; *Sun Co. v. Superior Court*, 29 Cal. App.3d 815, 105 Cal.Rptr. 873 (4th Dist. 1973) [order held illegal barring publication of names and addresses of incarcerated witnesses]; *Yeung v. Smith*, 30 Cal.App.3d



138, 106 Cal. Rptr. 225 (2d Dist. 1973) [order held illegal barring publication of material "except as occur in open court"]; *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972) [order held illegal barring publication of proceedings in open court]; *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107 (5th Cir. 1974) [order held illegal barring publication, *inter alia*, of sketches of court proceedings]. See also *Oliver v. Postel*, 30 N.Y.2d 171, 331 N.Y.S.2d 407, 282 N.E.2d 306, (1972) [dictum]; *United States v. Schiavo*, 504 F.2d 1 (3rd Cir. 1974) (*en banc*), *cert. denied*, 419 U.S. 1096 (1975) [based on denial of due process to newspapers]; *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975) [based on propriety of refusal of military court martial to limit publication by press].

As the diversity of the courts that have rendered these decisions indicates, let alone the unanimity of the bar association and judicial reports referred to above, it has generally been accepted that *no* prior restraints will pass constitutional muster in the area of reporting about judicial proceedings. Nonetheless, the Nebraska decision now before this Court is not the first to reach it in this area; it is, in fact, the third to come before this Court in two years—each decision involving a direct prior restraint on reporting with respect to judicial proceedings. See *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301 (1974) [stay granted of restrictive order barring publication of, *inter alia*, testimony given in open pretrial hearing]; *Newspapers, Inc. v. Blackwell*, 421 U.S. 997 (1975) [stay denied of restrictive order barring publication of names of jurors.]\* Moreover, other unreported decisions

\* Mr. Justice Brennan and Mr. Justice White would have granted the stay; the Chief Justice and Mr. Justice Douglas did not participate. The only reported case in American history of which we are aware prior to *Blackwell* in which a prior restraint on reporting about court proceedings was not reversed on appeal was *Schuster*

have issued entering direct prior restraints on the publication of, for example, the change of a plea in open court,\* any opinion as to guilt or innocence,\*\* and a public jury verdict\*\*\*.

While it is difficult to state with certainty why courts in recent years have begun to issue restraints on the press, despite the existence of the authorities previously referred to,\*\*\*\* we believe three repeatedly articulated misconcep-

*v. Bowen*, 347 F.Supp. 319 (D. Nevada 1972), *remanded with directions to vacate and dismiss as moot*, 496 F.2d 881 (9th Cir. 1974). *Schuster*, like *Blackwell*, involved a prior restraint on the publication of the names of jurors. It was upheld by the District Court on the ground—which we believe was plainly erroneous—that the entry of such an order could be considered a "legislative" as opposed to a "judicial" act of a court. On that basis, the district court ruled the publication was not a prior restraint. (347 F.Supp. at 320). On appeal, the Court of Appeals held the case moot, observing that there was no showing that the judge who had entered the order or any other judge in the state had ever entered a similar order or was likely to do so. (496 F.2d at 882).

\* *State v. Payne*, No. 74-7F (Cir.Ct. Manatee Co. Fla., Apr. 4, 1974).

\*\* *People v. Green*, Nos. L28145F-L28150 (San Francisco Mun. Ct. Dep't 19, May 9, 1974).

\*\*\* See, *Wood v. Goodson*, 253 Ark. 196, 485 S.W.2d 213 (1972).

\*\*\*\* One post-*Sheppard* study, based on interviews of prosecuting attorneys, indicates that newspapers and broadcasters have significantly curtailed the use of what is traditionally believed to be prejudicial material. Gerald, "Press-Bar Relationships: Progress since *Sheppard* and *Reardon*," 47 *Journalism Quarterly* 223 (1970). We know of no study, however impressionistic, indicating that publication of such news has increased in recent years. In this respect, newspapers in 23 states are parties to a variety of press-bar "guidelines" by which the press has voluntarily agreed, *inter alia*, "generally" not to print certain material and to "carefully consider" the potential for prejudice of certain other material before publishing it. As of 1974, the states were the following: Arizona (1968), California (1970), Colorado (1969), Idaho (1969), Kentucky (1970), Massachusetts (1963), Minnesota (1968), Missouri (1968), Nebraska (1970), New Jersey (1972), New Mexico (1969), New York (1969), North Carolina (1966), North Dakota (1971), Oklahoma (1968), Oregon (1962), Pennsylvania (1971),

tions with respect to previous decisions of this Court bear some responsibility and we urge the Court to take this opportunity to deal with what we believe to be those misconceptions. They relate to the articulation by this Court of the "heavy presumption" doctrine in prior restraint cases; the decision of this Court in *Sheppard*; and the decision of the Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972). We deal separately with each.

### 1. The "Heavy Presumption" Against Prior Restraints.

At the heart of the Nebraska Supreme Court opinion is the proposition that since this Court has more than once observed that any prior restraint bears a "heavy presumption of invalidity",\* the intended implication was "that if there is only a presumption of unconstitutionality then there must be some circumstances under which prior restraints must be constitutional for otherwise there is no need for a mere presumption." (55a). This conclusion, while not entirely wrong, turns the prior restraint doctrine on its head. There is no doubt that there are "some circumstances" in which prior restraints have been held constitutional. But the fact that all prior restraints are "not unconstitutional *per se*", *Southeastern Promotions, Ltd. v.*

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South Dakota (1971), Texas (1969), Utah (1969), Virginia (1971), Washington (1966), Wisconsin (1970). Not the least offensive passages in various of the opinions of the Nebraska courts are references to those "guidelines" as some form of concession by the press that it may never publish the material which it has merely promised to "carefully consider" before publishing. To say the very least, any use of such guidelines to support the entry of any prior restraint can only result in the collapse of these precariously constructed bridges between journalists and the bar.

\* See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 714, (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 283 U.S. 697 (1931).

*Conrad*, 420 U.S. 546, 558 (1975) does not mean that there is to be a continuing *ad hoc* judicial balancing process as to whether particular prior restraints are or are not to be entered. In fact, as this Court made clear in *Southeastern Promotions*, "[i]n order to be held lawful" a prior restraint "first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints. . . ." (420 U.S. at 559)

With respect to prior restraints on the press, the "narrowly defined exceptions" on news reporting have thus far been limited to *one* area—that of national security. As summarized by Mr. Justice Brennan in *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971):

"Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation 'is at war,' *Schenck v. United States*, 249 U.S. 47, 52 (1919), during which time '[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and locations of troops,' *Near v. Minnesota*, 283 U.S. 697, 716 (1931)."

The absolute prohibition on prior restraints on news reporting by the press except in this one area is deeply rooted in American history. The First Amendment itself "developed directly out of attempts to license the press" and as Professor Emerson has written, "[n]othing in the growth of modern society has, thus far at least, appealed to the country as ground for altering the considerations which led to the elimination of prior restraint upon the press." Emerson, *The Doctrine of Prior Restraint*, 20



Law and Contemp. Prob. 648, 662 (1955). In a number of opinions prior and subsequent to *Near v. Minnesota*, 283 U.S. 697 (1931), the ban on prior restraints on publication was expressed as an absolute. See, e.g., *Patterson v. Colorado*, 205 U.S. 454, 462 (1907); *Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936); *Kunz v. New York*, 340 U.S. 290, 307 (1951) (Jackson, J. dissenting). In dictum in *Near*, a narrow exception in certain national security cases was adverted to; in *New York Times Co. v. United States*, *supra*, the same exception was discussed; in no press case involving what would otherwise be protected speech under the First Amendment has any other exception received, in any fashion, the imprimatur of this Court.

Other prior restraint cases have, of course, reached this Court. But in each such case, the speech or speech plus action involved did not involve the reporting of news. It related, instead, to material which was at least potentially less than fully protected, or was subject to governmental regulation. That was the case, for example, in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) and *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961), both of which involved alleged obscenity. It was the case in *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) which was alleged to be analogous to a "fighting words" case. And it was the case in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), which involved what has been referred to as "commercial" speech. In none of these cases was the speech involved the traditional stuff of which news is made—the recitation of facts or opinion by the press about matters of public interest or concern.\*

\* Even in such cases, the protection afforded against prior restraints has been extremely broad. See, *Lovell v. Griffin*, 303 U.S.

Apart from the fact that there has never been adopted any "exception" to the prior restraint doctrine with respect to press reporting about criminal court proceedings, or, indeed, in any area except national security, and the fact that reporting about such proceedings cannot pos-

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444 (1938) [ordinance prohibiting distribution by hand or otherwise of literature of any kind without first obtaining permission of City Manager held unconstitutional prior restraint]; *Hague v. CIO*, 307 U.S. 496 (1939) [ordinance held void because it allowed previous administrative censorship of speech and assembly in public places]; *Schneider v. New Jersey*, 308 U.S. 147 (1939) [municipal ordinance empowering Chief of Police to refuse solicitation permit if "canvasser is not of good character or is canvassing for a project not free from fraud" (*id.* at 149) held invalid as a prior restraint]; *Cantwell v. Connecticut*, 310 U.S. 296 (1940) [state statute prohibiting solicitation for religious causes absent a certificate from a designated official held invalid as prior restraint]; *Saia v. New York*, 334 U.S. 558 (1948) [municipal ordinance barring use of loudspeakers in public places except with permission of Chief of Police held invalid as prior restraint because it prescribed no standards to guide police discretion and was not "narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound. . . ." (*Id.* at 560)]; *Kovacs v. Cooper*, 336 U.S. 77 (1949) [ordinance making it unlawful to operate on city streets a "sound amplifier . . . or any instrument of any kind or character which emits therefrom loud and raucous noises" (*Id.* at 78) upheld as "permissible exercise of legislative discretion" (*Id.* at 87)]; *Kunz v. New York*, 340 U.S. 290 (1951) [municipal ordinance giving administrative official discretionary power without appropriate standards to deny right to hold religious meetings on public property held invalid as prior restraint]; *Niemotko v. Maryland*, 340 U.S. 268 (1951) [municipal custom requiring permit before meetings could be held in city park held invalid as prior restraint due to "absence of narrowly drawn, reasonable, and definite standards for the officials to follow" (*Id.* at 271)]; *Poulos v. New Hampshire*, 345 U.S. 395 (1953) [municipal ordinance construed by State Supreme Court to leave no discretion to licensing officials as to granting licenses for holding religious meetings in public parks upheld as thus construed]; *Staub v. Baxley*, 355 U.S. 313 (1958) [municipal ordinance requiring permit to solicit citizens to become members of any "organization, union or society" which requires fees or dues from its members, such permit to be granted or refused based on character of applicant, nature of organization, and effects on general welfare of citizens, held invalid on its face as prior restraint].



sibly be considered as "unprotected" speech, there is simply no basis upon which any new exception for such publication should be adopted. In no other area is a party who could be harmed by publication so protected by already existing societal mechanisms—those very devices specified by this Court in *Sheppard*.<sup>\*</sup> Indeed, if recent experience in the area teaches anything, it is that juries are able to deal with highly publicized cases and, where appropriate, to acquit accused defendants whether they are named Joan Little or Angela Davis—or John Connally or John Mitchell.

There is, moreover, a special risk of permitting the imposition of prior restraints on the press in its reporting with respect to the courts. For not only would the courts find themselves in the extremely delicate position of weighing which statements about proceedings before them might be made, but they would be entering restraints on the very institution whose function is to expose governmental wrongdoing in all branches of government, including the judiciary. At its best, the press can be the "handmaiden of effective judicial administration" referred to by the Court in *Sheppard*; at their worst, courts can be instruments of tyranny, as has so often occurred abroad. It is, we submit, the hypothesis of the First Amendment that the press will, often enough, act at its probing, incisive, ubiquitous best; and that it will, often enough, expose wrongdoing and wrongdoers that it must be free, without

<sup>\*</sup> These means will be dealt with at length in petitioners' brief to this Court and we will not repeat the material to be contained therein, with which the *amici* fully agree. We also do not deal separately in this brief with the propriety of the bar placed by the decision of the Nebraska Supreme Court on the reporting of material already disclosed in open court during the preliminary hearing. The *amici* believe that the bar on such publication is plainly contrary to such decisions as *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) and *Estes v. Texas*, 381 U.S. 532, 541-42 (1965), as well as to the authorities discussed in this brief, and urge the Court so to hold.

advance censorship, to print as it chooses. This is true despite the recognition that the press has "sometimes been outrageously abusive, untruthful, arrogant and hypocritical." <sup>\*</sup> For it is also the hypothesis of the First Amendment that with all the potential for harm that must be acknowledged in a press as free as exists in this country, the greater risk is governmental misconduct—misconduct that only a press that is free is able to expose.

A few examples may be useful. If a preliminary hearing is held of an alleged leader of organized crime who has confessed to a crime, yet that defendant is freed on his own recognizance, we believe public comment—and immediate public comment—upon the propriety of the magistrate's action may well be proper and societally useful. If a sitting public official is accused of a crime, if the press has knowledge of a confession by him and if that confession is *not* introduced at a preliminary hearing, the press may well serve the public by writing about the hearing and the failure to introduce the confession at that hearing. If a confession is introduced at a preliminary hearing against a defendant and the press has information that it was coerced, it would surely serve the public for the press to publish the information it has about the confession. And if a confession is made at a pre-trial hearing and the press has reason to believe—or to inquire into the possibility—that the other more powerful but thus far unaccused figures may be culpable, the public may well be served by continued public scrutiny of the *bona fides* of the confession. The last hypothetical, of course, is Watergate.

We do not set forth these hypotheticals in any effort to exhaust the range of situations which can arise in which the press may choose—and perhaps wisely choose—to print

<sup>\*</sup> Stewart, "Or of the Press", 26 *Hastings L.Rev.* 631, 636 (1975).

confessions prior to the commencement of criminal trials. Nor do we suggest that the *amici* themselves would react identically and make the same decision as to publication or broadcast in these situations—or that posed in Sutherland, Nebraska. It is the *amici* position, however, that these difficult decisions are editorial in nature and that, like other editorial decisions, they are and must remain matters of “editorial control and judgment”. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

Of course, other societies have made other judgments. In most nations in the world, there is no press freedom at all. And even in countries with long-standing democratic traditions there is virtually no press freedom as it is understood and practiced in this country. In England, for example, the system of prior restraint is firmly embedded in history. The Licensing Act of 1662 13 & 14 CAR. 2, c. 33 provided that no person was allowed to print any material unless it was first duly licensed by a state or clerical functionary. Long after the expiration of the Licensing Act, the English courts continued to impose restraints upon publication commenting on court proceedings. In *The King v. Clement*, 4 B. & Ald. 218, 106 Eng. Rep. 918 (K.B. 1821), *aff'd*, *In re Clement*, 11 Price 68, 147 Eng. Rep. 404 (Ex. 1822), for example, the Court held that it had “authority to make any order which they might judge to be necessary in order to preserve the purity of the administration of justice in the course of proceedings then pending before them, and to prohibit any publications which might have a tendency to prevent fair and impartial consideration of the case.” See also *The St. James's Evening Post Case*, 2 Atk. 469, 26 Eng. Rep. 683 (Ch. 1742). In modern times, the English courts continue to impose restraints upon publications commenting on court proceedings, even when such court proceedings involve matters of the highest public

importance. Thus, in *Attorney-General v. Times Newspapers Ltd.*, [1973] 3 All E.R. 54 (H.L.), a case arising out of the London Times' attempt to report upon its extensive investigation of the national tragedy surrounding the deformities caused to hundreds of children born to mothers who took the drug Thalidomide during their pregnancies, the House of Lords held that the London Times “be restrained from publishing . . . any article or matter which prejudices the issues of negligence, breach of contract or breach of duty, or deals with the evidence relating to any of the said issues arising in any actions pending or imminent against [the drug company which produced and sold Thalidomide in England] in respect of the development, distribution or use of the drug ‘Thalidomide’ . . .” *Times Newspapers, supra*, [1973] 3 All E.R. at 87. The House of Lords' ruling is especially striking in view of the fact that the Thalidomide controversy had already been stalled in the English courts at the time of the decision for more than eleven years. So different is the English system from ours that when confronted with such a lengthy delay in the press' ability to inform the public about an issue of such obvious national importance, the House of Lords, per Lord Reid, could still conclude:

“The purpose of the law [prohibiting publication while a case is *sub judice*] is not to prevent publication of such material but to postpone it.” (*Id.* at 66)

Indeed, so different is the English system that the editor of the London Times, Harold Evans, has observed that the Watergate exposures simply could not have been printed in England:

“We might all reflect: what would have happened in London if, after all, a brave or ignorant editor had published something like that June 1972 report in a



British context? The editor would not have been able to plead that the crime of Watergate reached to the highest in the land. He would not have known. What would have happened after the inevitable prosecution by the Attorney-General, the heavy fine of imprisonment, the reply by the Lord Chief Justice and the scandalized letters to the *Times*? Would other editors have rushed in where one seemed to have blundered? Would the IBA have allowed *World in Action* to do the same thing? Would the BBC Governors have unleashed *Man Alive*?

In a word, No."\*

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\* Address by Harold Evans, *The Half-Free Press*, in *THE FREEDOM OF THE PRESS* 25 (1974). Illustrative of the effects of English law on English journalists are the following passages from the 1975 edition of the book entitled *ESSENTIAL LAW FOR JOURNALISTS* written by L. McNae and R. Taylor for English journalists.

"45. It cannot be stressed too strongly that, when papers are reporting crime (as opposed to court hearings) the greatest possible care should be taken to discover whether an arrest has been made or is imminent. This will involve stopping the story already prepared—even it has already appeared in early editions—and substituting a 'safe' version.

"46. The story need not be dropped entirely: certain facts are established and their publication could not possibly influence a jury one way or the other.

"47. For instance, it would be safe to report that a cashier had been attacked and knocked unconscious during a raid on a bank; but it would be quite improper to go on to describe his assailants.

• • •

"49. A newspaper can be guilty of 'interfering with judicial proceedings' in publishing a photograph of a 'wanted man', or a man under arrest.

"50. The test is whether any question of formal identification is likely to arise. This is something that an editor is unlikely to be in a position to decide for himself.

"51. The contempt lies in the fact that, at an identification parade or from the witness box, a witness is likely to 'recog-

The faults of the English system were recognized early in American history. Madison noted:

"The freedom of the press and the rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution." 1 MADISON, *ANNALS OF CONGRESS* 1789-90, 434 (1834).

Madison later declared that "... the state of the press ... under common law cannot be the standard of its freedoms in the United States." 6 MADISON, *Writings of James Madison*, 1790-1802, 387 (1910). Madison emphasized that the "security of the freedom of the press requires that it should be exempt not only from previous restraints by the executive, as in Great Britain, but from legislative restraint also." 4 MADISON, *Writings of James Madison*, 1790-1802, 543 (1910). And, in *Bridges v. California*, 314 U.S. 252 (1941), this Court specifically rejected the English system as a source for American jurisprudence.

There is still a further objection to the creation of a second "narrow exception" to the prohibition against prior restraint upon the press. For however narrow the exception, it will be urged as a precedent for the creation of still more exceptions—and urged with some degree of plausibility *unless* what this Court referred to in *South-eastern Promotions* as the "prohibition" against prior restraints is taken to be just that.

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nize' the man who he has seen in the paper and to identify him as the man he saw committing the crime.

"52. The remedy is to seek the advice of the police and to follow it. If they say that publication would be prejudicial, the picture should not be used." (pp. 91-92)

It is an understatement to observe that the very notion of "safe" stories, of reliance on official advice to avoid legal confrontations, and the like is anathema to American experience and to the First Amendment.



Libel is one example. Surely a party who can allege and prove that a libel is about to be printed about him is not irrational in asserting that society is harsh in relegating him to damages and denying him an injunction—regardless of the proof he submits. Yet, since what appears to be the first prior restraint case in American history, *Brandreth v. Lance*, 8 Paige Ch. 24 (N.Y. 1839), the courts have consistently held that no libel may be enjoined. In that case, the court held—in terms the Nebraska Supreme Court would evidently consider “absolutist” or “extremist” (62a)—that:

“It is very evident that this court cannot assume jurisdiction . . . [to enjoin an anticipated publication of a libelous pamphlet], or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which, as the Legislature has decided, cannot safely be entrusted to any tribunal consistently with the principles of a free government.” (8 Paige Ch. at 26.)

More recent cases concluding similarly include *ABC, Inc. v. Smith Cabinet Manufacturing Co.*, 312 N.E. 2d 85 (Ind. Ct.App. 1st Dist. 1974).\*

Again, in *Near v. Minnesota* itself, the harm which could have been caused by permitting the publication of the racist material there involved, 283 U.S. at 724-26, was evident; the social utility of publication was minimal. None-

\* It is a noteworthy aspect of the *ABC* case that although the prior restraint was there ultimately held unconstitutional, it took 291 days from the scheduled broadcast of an enjoined ABC program to the entry of an order in its favor permitting the broadcast. The subject of the program was fire hazards; the enjoined sequence demonstrated that plastic baby cribs burn far more quickly than wooden ones. It was that information that the public did not learn for 291 days due to the prior restraint in effect.

theless, the Court concluded that so clear was the prohibition on prior restraints that the publication by the press could not be enjoined.

There is, in short, no end of plausible reasons for the imposition of prior restraints. And if the courts are to engage in a kind of continual *ad hoc* balancing process, even one which imposes “presumptions” against prior restraints on news reporting, we have no doubt that the courts will have much balancing to do in the years to come. But the effect of that process could only be to limit the amount that is published and broadcast and, ultimately, to deprive the public of much that it should know. The bars that have heretofore existed against prior restraints on publication were designed to avoid precisely those results.

## 2. The *Sheppard* Decision.

A second misconception of the Nebraska Supreme Court ruling lies in its reliance on *Sheppard* as authority for the imposition of prior restraints on the press. That *Sheppard* should have been so cited reflects what we believe to be a total misunderstanding of what *Sheppard* held. *Sheppard*, while not uncritical of the nature of certain of the articles written by the Cleveland press before and during the Samuel Sheppard trial, set forth a variety of means available to trial judges to assure a defendant his Sixth Amendment rights. The means were varied, ranging from limitations on movement of the press in the courtroom, to the insulation of witnesses from excessive public exposure; the control of releases by police officers, witnesses and counsel; admonitions to the jury to disregard media coverage; the use of *voir dire* to insure avoidance of prejudice to defendant; changing the venue of trials; continuances; sequestration; and finally, where necessary, new trials. What is clear from *Sheppard* is that it does not support

the entry of any direct prior restraints. Indeed, the critical language in *Sheppard* with respect to that issue is the Court's conclusion that:

"A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. *This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media. . . .*" (384 U.S. at 350; emphasis added.)

A correct later interpretation of *Sheppard* is contained in *Younger v. Smith*, 30 Cal.App. 3d 138, 106 Cal.Rptr. 225 (2d Dist. 1973). In that case, a court order barred not only extrajudicial comment by counsel, parties, witnesses and the like with respect to a widely reported murder trial (relating to the murder of a four year old girl) but also the press from "publishing any matters with respect to the present cause except as occur in open court . . ." (106 Cal. Rptr. at 231-32). The California Court of Appeals upheld the restrictions on certain statements being made to the press but held "the direct restraint against the media was impermissible." (106 Cal.Rptr. at 236). In its analysis of *Sheppard*, the California ruling pointed out that in that case this Court had considered a case with far more publicity, much of which was openly hostile to the defendant, and that in spite of all the publicity the Court had "brushed aside any consideration" of sanctions against "a recalcitrant press" on the ground that less drastic measures would "guarantee" *Sheppard* a fair trial.

A similar analysis is contained in *United States v. Dickinson*, *supra*, which also refers to the fact that:

"Indeed, the *Sheppard* opinion had specifically declined to 'place any direct limitations on the freedom traditionally exercised by the news media' and had expressly asserted that 'of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom.' In recognition of those dictates the Kaufman Committee's recommendations deliberately eschew any suggestions for direct control of newsmen except in two very carefully delineated situations—(i) the seating of news media representatives so as to minimize disruptive influences during trial and (ii) the televising, photographing, or broadcasting from the courtroom." (465 F.2d at 505)

In short, *Sheppard* lends no support whatever to the proposition that prior restraints may be entered against the publication of news by the press about the courts; indeed, its thrust is quite to the contrary.

### 3. The *Branzburg* Ruling.

There remains the question of the degree, if any, to which dictum in this Court's *Branzburg* ruling may be relied upon—as did the Nebraska Supreme Court (53a-54a)—to support the issuance of prior restraints against reporting about criminal proceedings. In context, the passage in question reads as follows:

"It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965); *New York Times Co. v. United States*, 403 U.S. 713, 728-730 (1971) (Stewart, J., concurring); *Tribune*



*Review Publishing Co. v. Thomas*, 254 F.2d 883, 885 (CA3 1958); *In the Matter of United Press Assns. v. Valente*, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954). In *Zemel v. Rusk*, *supra*, for example, the Court sustained the Government's refusal to validate passports to Cuba even though that restriction 'render[ed] less than wholly free the flow of information concerning that country.' *Id.*, at 16. The ban on travel was held constitutional, for '[t]he right to speak and publish does not carry with it the unrestrained right to gather information.' *Id.*, at 17.

"Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), for example, the Court reversed a state court conviction where the trial court failed to adopt 'stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested,' neglected to insulate witnesses from the press, and made no 'effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides.' *Id.*, at 358, 359. '[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters. *Id.*, at 361. See also *Estes v. Texas*, 381 U.S. 532, 539-540 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963).

"It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury." (408 U.S. at 684-85; emphasis added.)

The *amici* submit that the conclusion of the Nebraska Supreme Court that *Branzburg* supports the entry of prior restraints against the press is erroneous. *Branzburg*, of course, was not a prior restraint case. It dealt, as all the opinions in the case were careful to point out, exclusively with the claimed right of journalists not to testify with respect to their communications received from confidential sources. As for the language used by Mr. Justice White quoted above, we believe a far more reasonable interpretation, given the context of the underscored portion, than that provided by the Nebraska decision is that when the press is denied the right to attend court proceedings it cannot, *a fortiori*, report about those proceedings. Indeed, a later opinion of Mr. Justice White indicates the correctness of this interpretation. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974), Mr. Justice White, in his concurring opinion, observed that:

"... According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). A newspaper or magazine is



not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. Cf. *Mills v. Alabama*, 384 U.S. 214, 220, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). We have learned, and continue to learn, from what we view as the unhappy experience of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purpose of controlling the press might be, we prefer 'the power of reason as applied through public discussion' and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." (418 U. S. at 259).

We submit that *Branzburg*, which does not refer to the prior restraint doctrine, does not refer in any manner to the "virtually insurmountable barrier between government and the print media", and does not refer to any prior restraint case simply cannot be taken as authority for the overruling of so much of the history of this nation. Cf. *United States v. Dickinson*, *supra* at 507, n. 14. And, to the extent the *Branzburg* dictum is so understood, we believe it is inconsistent with the First Amendment and should, on reflection, be rejected.

### CONCLUSION

We have not contended in this brief that the First Amendment must always prevail against all challenges or that there could not arise a difficult conflict between First and Sixth Amendment rights in cases involving access to the courts, statements to the press or even contempt by the

press. Those issues, however, do not arise in this prior restraint case. Here, this Court must decide whether the single most important barrier between the press and the government may be breached—and breached in an area where significant alternative means exist to vindicate the Sixth Amendment rights of defendants. The *amici* urge the Court to reverse the decision of the Nebraska Supreme Court.

Respectfully submitted,

FLOYD ABRAMS  
EUGENE R. SCHEIMAN  
KENNETH M. VITTOR  
CAHILL GORDON & REINDEL  
80 Pine Street  
New York, N.Y. 10005  
*Attorneys for Amici Curiae*

### Of Counsel:

CORYDON B. DUNHAM  
Vice President and  
General Counsel  
National Broadcasting Company,  
Inc.  
30 Rockefeller Plaza  
New York, New York 10020  
*Attorney for National Broad-  
casting Company, Inc.*

DAVID H. MARION  
HAROLD E. KOHN, P.A.  
1214 IVB Building  
1700 Market Street  
Philadelphia, Pa. 19103  
*Attorneys for Philadelphia  
Newspapers, Inc. and Parade  
Publications, Inc.*

JAMES C. GOODALE  
Executive Vice President and  
Counsel  
The New York Times Company  
229 W. 43rd Street  
New York, New York 10036  
*Attorney for The New York  
Times Company*  
  
DANIEL FELDMAN  
ISHAM, LINCOLN & BEALE  
One First National Plaza  
Chicago, Illinois 60670  
*Attorneys for Chicago Sun-  
Times and Chicago Daily News*

ROBERT SACK  
PATTERSON, BELKNAP & WEBB  
30 Rockefeller Plaza  
New York, New York 10020  
*Attorneys for Dow Jones & Company, Inc.*

NORMAN SINEL  
General Counsel  
Public Broadcasting Service  
West Building  
L'Enfant Plaza  
Washington, D.C. 20024  
*Attorney for Public Broadcasting Service*

DONALD CREWS  
JACKSON, WALKER, WINSTEAD,  
CANTWELL & MILLER  
1300 First National Bank Building  
Dallas, Texas 75202  
*Attorneys for Harte-Hanks Newspapers, Inc.*

JOHN B. SUMMERS  
General Counsel  
National Association of Broadcasters  
1771 N Street, N.W.  
Washington, D.C. 20036  
*Attorney for National Association of Broadcasters*

WILLIAM MULLIN  
General Counsel  
National Newspaper Association  
491 National Press Building  
Washington, D.C. 20045  
*Attorney for National Newspaper Association*

WILLIAM BARNABAS MCHENRY  
DAVID OTIS FULLER, JR.  
The Reader's Digest Association  
200 Park Avenue  
New York, New York  
*Attorneys for The Reader's Digest Association, Inc.*

ELEANOR APPLEWHAITE  
General Attorney  
CBS Inc.  
51 West 52nd Street  
New York, New York 10019  
*Attorney for CBS Inc.*

RICHARD M. SCHMIDT, JR.  
IAN VOLNER  
COHN AND MARKS  
1920 L Street, N.W.  
Washington, D.C. 20036  
*Attorneys for American Society of Newspaper Editors, The Society of Professional Journalists, Sigma Delta Chi and Associated Press Managing Editors Association*

J. LAURENT SCHARFF  
PIERSON, BALL & DOWD  
1000 Ring Building  
1200 18th Street, N.W.  
Washington, D.C. 20036  
*Attorneys for Radio Television News Directors Association*